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The *Chicago Legal News* says that Judge Tuthill, of the Cook County Circuit Court, has recently refused to release a party from payment of alimony to his divorced wife because of bankruptcy proceedings in the federal district court. "The decree of the court directing the payment of alimony is an order for a line of conduct by the defendant," said Judge Tuthill, "and cannot be absolved by proceedings in bankruptcy."

Kuhn v. Hemmenn, recently decided by the Supreme Court of New York, is a novel application of a well-settled doctrine as to the recovery by wife of damages for alienation of husband's affection. The court, reversing the trial court, held that an action would lie by a wife against the parents of her husband's mistress, who had induced and procured the abandonment of the wife for the mistress. It appeared that the efforts of the defendants here were directed toward the obtaining a divorce by the husband from plaintiff and his marriage with defendant's daughter, who had been seduced by him, and the court very properly said that defendants "could not escape the consequences of their acts upon the plea of parental solicitude. While we may sympathize with them as parents, we cannot justify the means which they adopted to effect a partial rehabilitation of their daughter at the expense of an innocent wife."

The recent case of L'Hote v. City of New Orleans, decided by the Supreme Court of Louisiana, has provoked considerable comment and not a little criticism. The decision, in effect, was a recognition and regulation of prostitution by law. The city of New Orleans has for a long period by ordinance limited the section within which houses of prostitution may be maintained. By an amendatory ordinance, passed several months ago, the authorities changed the boundaries of the region so as to include property theretofore outside of it; but, on the whole, to diminish and not enlarge it. The suit was for an injunction by a real estate owner, who contended that his property would be depreciated in value by bringing bawdy houses into his neighborhood. It was held that the new ordinance was a legitimate exercise of police power to which private interests must bow. "There remains," says the court, "the argument addressed to us, varied in form, but maintaining the general proposition that the ordinance operates to deprive the citizen of his property; that is, to depreciate its value—the same as deprivation in legal effect. We can readily appreciate there might be an arbitrary exercise of this power that would warrant an appeal to the courts. Thus, to extend these limits so as to embrace, without any apparent reason, if reason could exist, portions of the city always devoted to private residences, schools, churches and other lawful uses, might well be deemed oppressive and an abuse of the power of municipal government; but, as we understand this ordinance, in its main features it is restrictive—that is, confines these houses within narrower bounds. * * * To whatever extent, however, the right of private property may be deemed affected by this last ordinance, it must be borne in mind that it is their great power of government given to preserve the morals, health and lives of the community that requires the surrender of right by the citizen supposed to be exacted by this ordinance. To that police power all must yield obedience."

Case and Comment, in the course of a review of this case, very forcibly says: "Yet, after stating the facts of the case, and implying that the property had not been greatly damaged by the change, the court puts its decision on the broad ground that, whatever the extent of the damage, it is *damnum absque injuria*, because it results from a lawful exercise of the police power. The peculiarity of this is that the ordinance damages the citizen, not by prohibiting or restricting, but by permitting, the maintenance of such unlawful houses. It is a strange exercise of the police power to cause damage by legalizing or impliedly permitting an indictable nuisance. It is, indeed, said that the ordinance is restrictive, but, whatever the form of language, its effect is to permit such houses to be carried on within the limits specified, where, except for such permission, their

maintenance would be a misdemeanor. Therefore, where the ordinance extends those limits so as to permit such unlawful houses to be maintained near the dwelling of a citizen, where they had been previously prohibited, it is a case in which the alleged police power is exercised to do damage to innocent persons by allowing the commission of a common-law offense."

NOTES OF IMPORTANT DECISIONS.

ESTOPPEL BY DECLARATIONS.—In Crosby v. Meeks, 33 S. E. Rep. 913, decided by the Supreme Court of Georgia, it was held that where there is a dispute between a company and an individual as to which of the two owns a tract of land, and the agent of the company has falsely and fraudulently represented to such other claimant that his company has title to the property, and "back deeds" to the same, and, acting upon this, such other claimant purchases from the company an interest in the land, and receives from the company a deed thereto, which interest he, for value, transfers by deed to an innocent purchaser, who likewise acts upon the representations made by said agent, the agent is afterwards estopped from setting up title in his own name against such purchaser. This is true though such agent may afterwards acquire a perfect legal title to the property, not derived from either of the claimants above mentioned. The court said in part: "Counsel for plaintiff in error seem to rely upon the position that Crosby, as an individual, was a stranger to this transaction between the lumber company and Denton, and that, as strangers can neither take advantage of, nor be bound by an estoppel, the binding effect was between the immediate parties or their privies in blood, in law or in estate. As a proposition of law there can be no question about the soundness of the principle that when one makes a false representation touching the validity of the title to property that he sees is about to be transferred to an innocent purchaser, upon which representation the latter has acted in good faith, and upon the faith of which he has bought the property, the former cannot thereafter set up as against such purchaser or his vendee or privies in estate any claim in himself adverse to what he had previously commended as a perfect title. It manifestly makes no difference in what capacity he made such representation, whether on his own account, acting in his individual interest, or whether he was acting as agent in the interest of another. It is true that for the fraudulent misrepresentations of an agent acting in the course of his employment the principal is also bound, but it does not follow from this that the agent is not himself likewise individually and personally liable. Instead of being a stranger to the transaction, he is a direct participant in it, and in making the false representations he is responsible individually for the perpetration of the fraud, and is liable in damages as an individual to anyone who has acted upon such representations to his injury. It was accordingly held in the case of Campbell v. Hillman, 61 Am. Dec. 195, that an agent is responsible individually to a purchaser for fraud committed by him in the sale of property, although he does not profess to sell the property as his own, but acts throughout in his capacity as agent. It was further held in the same case that 'an agent is not absolved from liability for misrepresentations as to his principal's title to slaves by the mere fact that he informed the purchaser that his principal derived title under a will, which the purchaser had sufficient time and opportunity to examine, where the purchase was made upon the faith of the agent's representation that his principal had a good title, and the representation was calculated to induce belief and prevent further inquiry.' In Mechem, Ag., sec. 573 *et seq.*, this question is lucidly discussed, and the personal liability of an agent for representations made in behalf of his principal is clearly recognized. Among other things on this subject, that author says: 'It does not relieve the agent that the wrong was committed with the knowledge of the principal, or by his consent or express direction, because no one can lawfully authorize or direct the commission of a wrong. *A fortiori*, it is no defense that the agent, in committing the wrong, violated his instructions from his principal. Neither is it material that the agent derives no personal advantage from the wrong done. All persons who are active in defrauding or injuring others are liable for what they do, whether they act in one capacity or another.' It is really the person who directly participates in the perpetration of the fraud, whether he is acting for himself or another, as principal or agent, who is especially and particularly liable to the party wronged. In entire accord with these views are the decisions of this court in the cases of Nussbaum v. Heilbron, 63 Ga. 312, and Roberts v. Davis, 72 Ga. 819. From these principles we think it necessarily follows that if the defendants in this case had acted upon the false and fraudulent representations of Crosby, acting as agent for the lumber company, and in consequence had been forced to surrender the possession of land bought by them in good faith, a right of action for damages in their favor against the agent as an individual could clearly have been maintained. If this be true, then certainly they have a right to defend a suit instituted by Crosby himself, the success of which would cause him to reap the fruits of his own wrong."

CRIMINAL LAW—BURGLARY—EVIDENCE—INTENT.—In State v. Crawford, 80 N. W. Rep. 13, decided by the Supreme Court of North Dakota, it was held that in cases of burglary, where one and the same instrument is used both for the purpose of breaking and for the purpose of commit-

ting an ulterior crime within the building, it will suffice to show an entry by showing that the instrument so used was thrust into the building and was used in committing the ulterior offense, without showing that the accused entered the building in person. It appeared that the defendant was informed against for the crime of burglary in the third degree. The evidence tended to show that the defendant in the nighttime bored three holes with a two-inch auger through the walls of a granary, and into a mass of wheat stored therein. The weight of the grain forced several bushels of wheat to pass out of the aperture caused by the auger, which wheat, the evidence shows, was taken away and sold by the defendant. Upon this evidence the trial court directed the jury to acquit upon the ground that the evidence failed to show an entry into the granary. Held, that the ruling was error. It was held further, that the intent to steal within the granary is sufficiently shown by the fact that the wheat which was stored inside of the granary was by defendant's agency transferred from the inside to the outside of the granary. It is true that the law of gravitation co-operated with the defendant in removing the wheat; but the defendant by his own act set the law in motion upon the inside of the building, and thereby accomplished his criminal purpose. The court says: "There is no conflict of evidence in the case, nor is there any dispute between counsel as to the facts. The evidence shows that at the time and place stated in the information there was a certain building used as a granary, in which there was stored in bins about 800 bushels of wheat, and that in the nighttime three holes were bored with a two-inch auger through the walls of the granary, and into one of the wheat bins. The three holes were so connected together as to make one large opening through the walls, and into the wheat bin. It further appears that there was a depression in the mass of wheat directly over the aperture made by the auger, indicating that wheat had passed out of the bin through such aperture to the amount of several bushels, and, further, that some wheat was spilled on the ground directly under the opening through the wall of the granary. Other evidence tended to connect the defendant with the felonious asportation and sale of the grain. Upon this evidence the question is presented whether the State had made out a *prima facie* case when the evidence closed and the State rested its case. Defendant's counsel contends that the State had failed to establish two of the three essential elements of the crime charged, viz., the entry into the granary, and the intent to steal therein. In support of this theory, attention is called to the evidence which clearly indicates how the grain was extracted from the granary, and negatives the idea that the person who bored the holes through the walls went inside the building to steal therein, or for any purpose whatever. Nor is it claimed in behalf of the State that the accused personally went inside the granary for any purpose. As to the intent to steal inside the granary, the evidence, in our judgment, leaves no room for doubt. The accomplished fact clearly reveals the motive and purpose with which the act was done. The wheat was stored within the granary, and the evidence tends to show that the same was by the acts and agency of the accused taken possession of while in the granary, and removed from the inside of the granary to the outside, and was thereafter taken away from the premises in the nighttime. The defendant, under the evidence, acquired dominion over the grain taken while the same was within the building, and his intention to do so is too clear for discussion. It is true that the accused was aided by natural laws in taking possession of the grain within the granary, but such laws were deliberately invoked and set in motion by the acts of the defendant, done by his agency operating within the building.

"But counsel most strenuously contends that inasmuch as the evidence shows that the grain was removed through the opening made with an auger, and not otherwise, it therefore appears affirmatively that the defendant did not and could not have gone into the building, and hence that the State failed to establish the essential element of an entry. We cannot accept this conclusion from the evidence. It is manifest that the auger guided by the person who bored the holes passed through the walls of the granary into the mass of wheat therein, and also manifest that it was the auger operating within the building which set the law of gravitation in motion, and thereby enabled the man guiding the auger to remove the property from within the building to the outside. Using the auger for the double purpose of breaking and taking possession of the property within the building brings the case within the rule announced in the authorities hereafter cited. We quote first from the authorities cited by defendant's counsel. The rule is expressed in Bishop's New Criminal Law (volume 2, § 93), as follows: 'And there is no burglary if simply the tool used for breaking goes in, and neither any part of the person nor the instrument by which the ulterior felony is to be perpetrated does.' The same section contains the following language: 'Thus, to raise a window by placing the hands outside of it, and then thrust in a bar for forcing open the inside shutter, or to make a hole through a door with a centerbit, whereby some of the chips fall in, is insufficient, because neither the bar nor the centerbit was to be employed about the ulterior felony.' Another text writer cited by defendant's counsel puts the rule as follows: 'Whether the introduction of an instrument will be such an entry as to constitute burglary depends upon the object with which the instrument is employed. Thus, if the instrument be employed, not merely for the purpose of making the entry, but for the purpose of committing the contemplated felony; as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand is not in, this is an entry.' See 1 Rose, Cr. Ev. *366, citing other authority. The

rule as announced in these authorities seems to be well established, and generally acquiesced in without dissent; and as, in our judgment, it applies to the facts of this case, it will govern our decision. As has been seen, we hold, under the evidence, that the auger was used first in breaking, and again deliberately used for the purpose of committing the ulterior crime of stealing wheat within the granary, thereby constituting an entry, within the rule. Counsel for the State has cited extracts from other text writers, but we deem it unnecessary to quote them in support of a rule so well established. The case of Walker v. State, 63 Ala. 49, is directly in point. In that case the crime charged was burglary, and it was committed by boring a hole with an auger into a granary in which grain was kept, and by this means the grain was removed from the granary. In the course of the opinion the court used the following language: 'When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not of itself an entry. But when, as in this case, the instrument is employed not only to break, but to effect the only entry contemplated or necessary to the consummation of the criminal intent; when it is intruded within the house, breaking it, effecting an entry, enabling the person introducing it to consummate his intent,—the offense is complete. The instrument was employed not only for the purpose of breaking the house, but to effect the larceny intended. When it was intruded into the crib, the burglar acquired dominion over the corn intended to be stolen. Such dominion did not require any other act on his part. When the auger was withdrawn from the aperture made with it, the corn ran into the sack he used in its asportation. There was a breaking and entry, enabling him to effect his criminal intent without the use of any other means, and this satisfies the requirements of the law.' This case seems to us not only to be intrinsically sound in legal principle, but one which apparently is sustained by the unanimous voice of authority upon the question. The order directing an acquittal will be reversed upon the ground that it was error to hold that the evidence did not tend to establish an entry. The case should have been submitted to the jury with proper instructions upon the matter of the entry, as well as upon the other legal aspects of the case."

BILLS OF PARTICULARS IN ACTIONS BASED UPON NEGLIGENCE.

Preliminary Statement.—It will be assumed for the purposes of this article that a bill of particulars is an informal statement in detail, amplifying an original pleading which sets forth a cause of action or a ground of defense; that under statutory and code provisions, which vary in the different States and by virtue of the power existing at common law in a judge to control a trial, a party to a suit may be required to file a bill of particulars with the pleading it amplifies or subsequently, according to the direction of the court, with or without the request or motion of another party; that the party so filing the bill is concluded or limited thereby in his evidence to the particulars specified; that the bill should be as specific as the nature of the case admits, and that its office is not to require a disclosure of evidence, but rather to prevent surprise on trial.[1]

In Actions of Tort.—In matters involving accounts and in actions *ex contractu* generally the great advantage of bills of particulars can readily be seen. Items and details of goods sold and delivered, money had and received, work done and materials furnished, become absolutely necessary. As a matter of fact, bills of particulars arose from the use of the common counts in actions of debt and *assumpsit*, and are employed to this day most frequently in such cases. When actions of tort are considered, and especially when the damages claimed are unliquidated, or when for other reasons the cause of action or ground of defense is not of a nature to be specified or set out in detail, then the use of bills of particulars and the application of rules and principles thereto become more

[1] Bouvier's, Anderson's and Brown's Law Dictionaries; 3 Chitty, Prac., p. 612, Ed. of 1836; Tidd's Practice (3d Am. Ed.), 596; Stover's N. Y. Annotated Code of Civ. Proc. 1897, vol. 1, p. 489, and notes on following pages; Ency. of Plead. & Prac., 3, p. 517; Townsend on Libel (4th Ed.), p. 489; 1 Hilliard on Torts (4th Ed.), p. 380; 2 Civ. Prac. Repts. 240, where, in a note of several pages, the subject is fully presented, showing when, in New York, a bill is granted and when denied, with a complete citation of cases in that State to date; Dwight v. Germania Ins. Co., 84 N. Y., p. 493, the subject being fully discussed in opinion and briefs, with citation of many authorities; Roberts v. Cullen, 40 N. Y. St. Repts. 672; Turner v. Gt. No. Ry. Co., 15 Wash. 213; Gee v. Chase Mfg. Co., 12 Hun, 630; Van Olinda v. Hall, 82 Hun, 357; Wiegand v. De Jonge, 18 Hun, 405; Niemoller v. Duncombe, 53 N. Y. Supp. 872; Weidner v. Pauly, 141 Ill. 448; Orvis v. Dana, 1 Abb. N. C., p. 268, a leading case citing and discussing in opinion among other cases, Wren v. Weild, 4 L. R. Q. B., p. 213; Wood v. Jones, 1 Fost. & F. 301; Slator v. Slator, 8 Law Times Repts. (N. S.) 856; Lagan v. Gibson, 9 Irish Repts. (C. L. Series) 507; Starkweather v. Kittle, 17 Wend. 22; Blount v. Rick, 107 Ind. 238; Blackburn v. Wash. Gold Min. Co. (Wash.), 53 Pac. Rep. 369.

difficult. It has been held even in late decisions and text books, that bills of particulars cannot be required in actions *ex delicto*.[2] In Michigan so strongly was this doctrine enforced that a *mandamus* proceeding was successful which was brought to vacate the order of a circuit judge allowing a bill of particulars in an action on the case for consequential damages.[3] Puterbaugh's work on pleading and practice, a local Illinois book, following an earlier decision in that State, announced that doctrine in its edition of 1896.[4] The decided weight of authority, however, is that bills of particulars can be required in actions of tort, and they have been ordered or held allowable in actions of slander and libel to compel a specification of occasions alluded to in the pleadings;[5] in actions of criminal conversation;[6] in criminal prosecutions to show transactions relied on to support an indictment and for other purposes;[7] in actions for trespass, requiring particulars of premises and places and in actions for malicious prosecutions, conspiracy, conversation and escape.[8] It is not pretended that this is in any respect a complete list showing all the cases of tort in which particulars can be required. It simply shows that they can be required in this class of cases. The following comprehensive statement can be properly made: Unless there are provisions of statute or code to the contrary, the court has the power in any case at law to order of any party a bill of particulars when satisfied that thereby justice will be furthered. At common law such was the inherent power of the court. The provision of the New York code relative to this subject reads "in any case,"[9] and this has been followed in other States. Furthermore, the word "claim" has been held to include grounds of defense as well as causes of action.[10] Accordingly it would seem that motions for particulars are likely to become more common. An examination of digests and reports corroborates this statement. In comparatively few States up to the present time have appellate courts considered the questions connected with motions for particulars in negligence cases, but when occasion demands such considerations there are no reasons apparent for denying to trial courts the powers above outlined in these respects.

Particulars Seldom Required in Negligence Cases.—While, therefore, bills of particulars may be required in actions based on negligence, it is generally conceded that great care and fine discrimination should be exercised by courts in the use of such orders, lest embarrassment and hardship should result.[11] It certainly would be an injustice to compel a party to disclose his evidence or to so limit himself in its introduction that he would lose a meritorious case. If the complaint or specification is not sufficiently specific the proper remedy is by demurrer,[12] or by motion to make the pleading more definite and certain.[13] It would seem to be a logical conclusion that in this class of actions the only instances for the proper ordering of particulars are cases where the pleadings are too general to properly apprise the moving parties, and moreover are thus general and are still according to law and not subject to demurrer, which instances are not numerous.[14] When a defendant has filed a general issue plea thereby acknowledging the sufficiency of the several counts,[15] there is apparent inconsistency in an application for a bill of particulars as Justice Macomber suggested.[16] The digests indicate that it has not been the custom in most of the States to move for particulars in

[2] City of Plymouth v. Fields, 125 Ind. 323, where a distinction is made between injury to personal property and to the person. Lemmon v. Moore, 94 Ind. 40; McDonald v. Barnhill, 58 Iowa, 669.

[3] People v. Marquette Circuit Judge, 39 Mich. 437; Kehrig v. Peters, 41 Mich. 475.

[4] Puterbaugh's Pl. & Prac. (7th Ed.) 31; C. & A. R. R. Co. v. Smith, 10 Brad. 359.

[5] Orvis v. Dana, and cases cited therein, *supra*.

[6] Tilton v. Beecher, 59 N. Y. 176.

[7] McDonald v. People, 126 Ill. 150, 25 Ill. App. 350; Commonwealth v. Snelling, 15 Pick. 329; Lambert v. People, 9 Cow. 578; Lauer v. Dist. of Columbia, 26 Wash. L. Rep. 72.

[8] Ency. of Pl. & Prac. pp. 553, 554.

[9] N. Y. Code of Civ. Proc., sec. 531.

[10] Dwight v. Germania Ins. Co., *supra*; Butler v. Mann, 9 Abb. N. C. 49.

[11] Shinn's Pl. & Prac., vol. 1, sec. 643; Villiers v. Third Ave. R. Co., 48 N. Y. Supp. 614; Huller v. Bush Mfg. Co., 18 Abb. N. C. 88; Donohue v. Meares, 19 N. Y. Supp. 585; Manning v. Internat. Nav. Co., 49 N. Y. Supp. 182; C. & A. R. R. Co. v. Smith, *supra*; Murphy, Admx., v. Kipp & B., 13 N. Y. Super. Ct. (1 Duer) 659.

[12] Richmond & D. R. R. Co. v. Payne, 86 Va. 481; C. & E. I. R. R. v. O'Connor, 119 Ill. 894; Johnson v. F. & M. R. Ry. Co., 111 Ill. 412.

[13] Bliss on Code Pleading, sec. 425.

[14] Hanson v. Anderson, 90 Wis. 195; Barney v. Hartford, 73 Wis. 95; Clarke v. Ohio River R. Co., 39 W. Va. 732; Tidd's Practice, *supra*.

[15] C. & N. W. Ry. Co. v. Goebel, 110 Ill 821.

[16] Hazard v. Birdsall, 61 Hun, 208.

negligence cases for the reasons above outlined. The motion is more common in New York than elsewhere. Still, as the moving party has a chance of gain and none of loss the custom will probably increase.

What Particulars Will Be Required and What Will Not.—In a personal injury case the complaint did not state what part of the body was injured, and the plaintiff was ordered in a bill of particulars to describe the nature and extent of the injuries.[17] Where a plaintiff was injured by the explosion of a fly wheel and charged negligence in a general way, he was ordered to indicate what negligence, if any, he expected to show on trial besides the fact of the explosion.[18] A bill of particulars containing three clauses of specifications as to negligence causing the death of plaintiff's intestate by the sliding of a bank of clay and a fourth clause general, was held insufficient, as the last clause destroyed the effect of the specifications of the preceding clauses.[19] Plaintiff's intestate was killed by a train and the allegations of negligence were general. It was held that while caution should be exercised in ordering a bill of particulars in such a case, the defendant was entitled to a specification of the certain train of cars referred to as causing the death, the certain locomotive, the other trains mentioned, the place of the killing, the places of defective tracks, in what respect the operation of the trains was negligent, what rules were improper and what equipments were unsafe.[20] In a case against an electric light company, the court held that the plaintiff should state what approved appliances the defendant failed to use, but that it would be absurd to require the plaintiff, ignorant of such matters, to specify regarding those things pertaining to the electric light business in which the defendant was skilled.[21]

[17] Schweit v. Met. St. Ry. Co., 53 N. Y. Supp. 545; Mueller v. Tenth & Twenty-third St. Ferry Co., 56 N. Y. Supp. 310.

[18] Myers v. Albany Ry., 39 N. Y. Supp. 446, citing Dwight v. Ins. Co., *supra*; Baker, Admx., v. Sutton, 86 Hun, 588, and Piehl v. Albany Ry., 39 N. Y. Supp. 1131, where in an action against the same defendant under different pleadings a bill of particulars was denied.

[19] Baker, Admx., v. Sutton, *supra*.

[20] McCarthy, Admx., v. Lehigh Valley R. Co., 6 Misc. Rep. 422, citing Donohue v. Mears, *supra*; Keech v. R. W. & O. R. Co., 14 N. Y. St. Rep. 446, and Kearns v. C. I. R. R. Co., 17 N. Y. St. Rep. 692.

[21] Stillman, Admx., v. Brush Electric Light Co., 92 Hun, 504.

The words "hurt, bruised and wounded" were used to describe a personal injury, and while the court refused to order a bill of particulars it held that evidence of the fracture of the shoulder could not be introduced under such broad allegations.[22] Where it was alleged that an elevator was negligently constructed and operated, the court held that the plaintiff should set out in what respects the construction and operation were negligent.[23] A bill of particulars will not be ordered when the information lies peculiarly within the knowledge of the moving party;[24] and in a case brought to recover for injuries received by plaintiff while working at a card cutting machine, the request for particulars relating to the machine and its construction and operation was denied, because of the advantage the defendant had by its possession and use of the machine;[25] and where the defendant's means of ascertaining the items of the claim are as good as the plaintiff's, particulars will not be ordered.[26] An allegation that a step ladder was unsafe and insecure was regarded sufficiently definite.[27] An order requiring a bill of particulars was reversed where the plaintiff gave time and place and stated that he was riding in a carriage and the defendant so carelessly moved a motor as to cause collision.[28] These references illustrate in a general way the limits within which courts will act in ordering or denying bills of particulars in negligence cases. Clearly no exact and unchangeable rules can be formulated. The circumstances of each case should be considered. The opinions given in the carefully considered cases clearly indicate that the party moving for particulars, usually the defendant in negligence cases, has a right to know the particulars he does not know and cannot find out, and that the plaintiff does know, to an extent sufficient to allow preparation for trial and to prevent surprise at that time. He is not entitled to particulars if the declaration or complaint gives them, and if this pleading is not good at law, a demurrer or motion to make certain should

[22] Shadock v. Plank Road Co., 79 Mich. 7.

[23] O'Hara, Admx., v. Ehrich, 58 N. Y. Super. 250.

[24] Fink v. Jetter, 38 Hun, 163.

[25] Reardon v. Card Co., 50 N. Y. Sup. Ct. 514.

[26] Butler v. Mann, *supra*; Hawes v. Foote, 9 Misc. Rep. 203; Haynes v. Davidson, 18 Abb. N. C. 85.

[27] Schmidtkunst, Admx., v. Sutro, 16 Civ. Pro. 143.

[28] Villiers v. Third Ave. R. Co., *supra*, citing Constable v. Hardenbergh, 76 Hun, 434.

be interposed. The defendant has a right to know the time and place of his alleged negligence, and in what respect he was negligent, but he has no right to ask of the plaintiff particulars that are in the defendant's knowledge alone, or that he knows as well or can learn as well as the plaintiff. There is a difference also between an application for particulars to prepare an answer and one made to get ready for trial. An answer can in all propriety state that the defendant has no information as to the allegations made, and consequently a motion for particulars before answer would seem usually to be premature.[29] If the rule of court is such as is indicated in Shadock v. Plank Road Co., *supra*, whereby special evidence cannot be introduced under general allegations, surely the defendant is not injured if no particulars are allowed. In no case, seemingly, is it held that by a motion for particulars a plaintiff can be compelled to furnish to the opposite side his evidence or the names of his witnesses, or any facts not necessary to enable the defendant to be ready for trial and not to be surprised.

Moving Affidavits.—An essential to the obtaining of an order for a bill of particulars is a showing by affidavits or otherwise on the part of the moving party. "There must be some special ground alleged, otherwise, in every case of trespass, it would be a step in the cause to apply for a bill of particulars on the affidavit of the defendant, who would never know what the grievances complained of were."[30] These words apply to cases under consideration. The affidavits should state facts for the court's information; should be definite; made by the party, not by his attorney (if possible); should show that the party cannot acquire the information desired, and that means of obtaining the same are beyond reach, and state that the party has no suspicion or belief in regard to the matters.[31]

Conclusion.—It would be beyond proper limits to discuss in this article the extent to which the discretion of the trial court is final in granting or refusing particulars. It has been said that its action will not be reviewed, but the law reports show abundantly that the trial courts are reviewed and reversed in these matters. Any abuse of discretion will certainly be reversed.[32] The fact that judicial discretion in these regards does control to so great an extent is a consideration that should prompt both judges and attorneys to thorough examination and careful action in reference to applications for bills of particulars in this class of cases. The majority of negligence cases are against corporations that operate and control railways, street car lines, electric plants, mills and other extensive enterprises. These parties know all about the particulars of these vast operations, and the complicated machinery and appliances connected therewith. They know the instant a person is hurt or other injury caused on their territory. It is absurd to require a plaintiff, unlearned in such matters, to tell a railway company the particulars about the running of a certain train. This illustration applies to a great number of negligence cases. It is easy to see that a too liberal practice on the part of courts in ordering particulars in these cases might greatly interfere with the rights of the plaintiffs. On the other hand, these defendants should not be put to the expense and trouble of preparing for trials and conducting them when there is no merit in the plaintiffs' cases. If demurrers and motions to make more definite have not sifted out cases of fraud and attempts to force settlements with no good grounds and by motion for bills of particulars these results can be accomplished, the courts, upon proper affidavits, should order particulars and grant the relief thereby afforded.

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[29] Saalfield v. Cutting, 56 N. Y. Supp. 343; Jacobs v. Friedman, 59 N. Y. Supp. 382.

[30] Words of Baron Parke in Horlock v. Ledlard, 10 M. & W. 677, cited in Orvis v. Dana, *supra*.

[31] Holmes v. Jones, 13 Civ. Proc. 260; Constable v. Hardenbergh, *supra*; Bowman C. Co. v. Dyer, 52 N. Y. Supp. 159; Mayer v. Mayer, 57 N. Y. Supp. 1079; Gridley v. Gridley, 7 Civ. Proc. 215; Wales Mfg. Co. v. Lazzaro, 43 N. Y. Supp. 1110, and a number of cases therein cited on sufficiency of affidavits for this purpose. Gallerstein v. Man. R. Co., 57 N. Y. Supp. 394.

[32] Bowman C. Co. v. Dyer, *supra*; Witkowski v. Paramore, 93 N. Y. 467; Gee v. Chase Mfg. Co., *supra*.

BUILDING AND LOAN ASSOCIATIONS—POWER TO PURCHASE REALTY—ULTRA VIRES—ESTOPPEL—NOTICE.

NATIONAL HOME BUILDING AND LOAN ASSN. v. HOME SAV. BANK.

Supreme Court of Illinois, June 20, 1899.

1. A building and loan association incorporated under Laws 1879, p. 83, authorizing such associations to

purchase such real estate as it has a mortgage, lien or other interest in, has no power, either under the statute or irrespective thereof, to purchase real estate in which it has no interest, and to assume incumbrances thereon.

2. A contract with a corporation which it is not authorized to make, because beyond the scope of its powers, is void.

3. A building and loan association, which cannot buy real estate, except to protect itself, has no authority, because of the holding of a mortgage on one lot, to purchase the adjoining lot and assume an incumbrance thereon.

4. The rule estopping a corporation from raising the question of *ultra vires* where it has received the benefit of the contract does not apply where the contract is *ultra vires* in the sense that it is void; *i. e.*, without the scope of the powers of the corporation.

5. One dealing with a corporation must take notice of the statutory limitations on its power to contract.

CARTWRIGHT, J.: In November, 1893, Flora D. Bishopp made a trade of lots in the city of Chicago with the National Home Building and Loan Association, appellant, in pursuance of which appellant conveyed to her lot 10 in Lee Bros.' addition to Englewood, lots 15 and 16 in block 60 in Chicago University subdivision, and lot 36 in block 2 in Herring's subdivision. In exchange for these lots said Flora D. Bishopp and Jonathan D. Bishopp, her husband, conveyed to the building and loan association lots 5 and 6 in block 2 in Johnson & Clement's subdivision, and in the deed of the same it was agreed that the building and loan association should assume and pay an incumbrance on said lot 5 in the form of a trust deed executed by said Flora D. Bishopp and husband to Charles T. Page, trustee, to secure a note for $3,000 and interest. The trade was negotiated and carried out on the part of the association through J. O. Duncan, agent, who was employed by the association to negotiate loans and examine abstracts for it in Chicago, and he acted under the direction of the secretary of the association. After the exchange the association paid a mortgage of $600 on said lot 5, and the delinquent interest on the mortgage assumed in the conveyance. On May 14, 1895, the board of directors passed a resolution that the assumption clause in the deed was made without the authority of the association, and directed the execution and tender of a quitclaim deed of the lot to Flora D. Bishopp. The deed was made and tendered unconditionally, and the association thereby offered the lot to her without a return of the consideration, or any other condition. The note for $3,000 secured by the trust deed was transferred to the Home Savings Bank, one of the appellees; and it filed its bill in the Superior Court of Cook county to foreclose the same, asking for a decree against Flora D. Bishopp, a sale of the mortgaged premises, and a decree against the building and loan association for such deficiency as might exist. The building and loan association answered that the trade was consummated by direction of its president and secretary, but the clause assuming the mortgage was inserted without their knowledge or authority, and without the knowledge and authority of its board of directors; that such an agreement was *ultra vires* the corporation, and that it had tendered a quitclaim deed of the lot to the said Flora D. Bishopp. The bill was answered by Flora D. Bishopp and her husband, who admitted its material allegations, and filed their cross-bill, alleging the agreement for an exchange of the properties and the conveyances, and asking for a deficiency decree against the association. The building and loan association answered the cross bill, setting up the same defense as before and the cause was referred to a master, who reported in favor of a foreclosure and sale, and a decree against the building and loan association for any deficiency in the payment of the debt, interest, fees and costs. Exceptions to the report were overruled, and a decree was entered in accordance with it, which has been affirmed by the appellate court.

No objection is made to the foreclosure of the trust deed, or the sale of the premises; and the only question involved in this appeal is whether the contract inserted in the deed, by which the defendant, the National Home Building and Loan Association, agreed to assume and pay the debt, is binding upon it. This defendant, which denied the binding force of the agreement, is a corporation organized under the provisions of an act entitled "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such association," in force July 1, 1879. Laws 1879, p. 83. As a corporation, it is a creature of the law, having no powers but those which the law has conferred upon it. A corporation has no natural rights or capacities, such as an individual or an ordinary partnership; and, if a power is claimed for it, the words giving the power, or from which it is necessarily implied, must be found in the charter, or it does not exist. The law on this subject is stated by the Supreme Court of the United States in Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. Rep. 478, as follows: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." The purpose of this corporation is the raising of funds to be loaned to its members upon the security of its stock and unincumbered real estate. Manifestly, the business of trading in real estate or acquiring the same, except as incidental to their legitimate business, is wholly foreign to the purpose for which the State has created such corporations, and conferred upon them corporate powers. They have no power to take and hold real estate, and contracts made for the purchase of it are not enforceable. End. Bldg. Assns., secs. 305-308. But for the purpose of collecting debts it is essential that they should have some power with re-

spect to the real estate mortgaged to them, and for that purpose section 13 of the act for their incorporation provides as follows: "Any loan or building association incorporated by or under this act is hereby authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate upon which such association may have or hold any mortgage, lien or other incumbrance, or in which said association may have an interest, and the real estate so purchased, to sell, convey, lease or mortgage at pleasure to any person or persons whatsoever." Such corporations are not authorized, either by their charters or as an incident to their existence, to acquire or hold any real estate except such as has been mortgaged to them, or which they may have an interest in. Not only is this the rule to be derived from the act of the legislature authorizing their incorporation, under the general principles of law, but it is, and always has been, against the policy of the State to permit corporations to accumulate landed estates, or to own real estate beyond what is necessary for their corporate business, or such as is acquired in the collection of debts. Carroll v. City of East St. Louis, 67 Ill. 568; Trust Co. v. Lee, 73 Ill. 142; People v. Car Co., 175 Ill. 125, 51 N. E. Rep. 664; First M. E. Church v. Dixon, 178 Ill. 260, 52 N. E. Rep. 887. It is also a settled principle of American jurisprudence. 5 Thomp. Corp., sec. 5772. If a building and loan association were permitted to invest its money in the purchase of real estate, or to traffic or trade in such property, instead of keeping within the powers conferred upon it, by loaning such money and collecting it, it would not only be exercising powers not granted, but it would be carrying on a business inconsistent with the purpose of its creation, and against the fixed and uniform policy of the State. In People v. Trust Co., 130 Ill. 268, 22 N. E. Rep. 798, it was said (page 292, 130 Ill. and page 803, 22 N. E. Rep.): "The word 'unlawful,' as applied to corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do, or, in other words, such acts, powers and contracts as are *ultra vires*." In Central Transp. Co. v. Pullman's Palace Car Co., *supra*, the result of the decisions as to the exercise of powers not granted is summed up as follows: "All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts; and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

It is first contended, in support of the decree, that the contract by which the corporation assumed and agreed to pay the mortgage on lot 5, as a part of the consideration, was within its powers. The ground of this claim is that the corporation had a mortgage on lot 6 (the other lot which was conveyed to it), and the acquisition of that lot was a legitimate exercise of power. We do not see how the fact that it had power to purchase one lot would operate to give it power to purchase another. The right to acquire property in which it had an interest, could not be extended to other property in which it had no interest. If it could make a loan on a lot, and buy other property in the vicinity or adjoining it by merely including in the deed the mortgaged lot, the law would be evaded, and the policy of the State subverted. The law has given such a corporation power to purchase such real estate as it has a mortgage on, for its necessary protection in making collections; but that does not authorize it, by including such real estate, to buy another lot, or a subdivision or part of a town, and enter into the business of trading in real estate. If it could not purchase lot 6, upon which it held a mortgage, without buying other real estate, it was not authorized to buy it at all.

It is also argued that the building and loan association is estopped to raise the question whether the contract was *ultra vires*, because it has received the benefit of the contract, by the conveyance of property to it. That depends, as we think, upon the sense in which the term "*ultra vires*" is used. It has been applied indiscriminately to different states of fact in such a way as to cause considerable confusion. When used as applicable to some conditions, it has been frequently said that a corporation is estopped to make such a defense where it has received the benefit of the contract. For example, the term has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but which are within the powers of the corporation. In such a case the act may become binding by ratification, consent and acquiescence, or by the corporation receiving the benefit of the contract. Again, it has been applied to cases where an act was within the authority of the corporation for some purposes or under some circumstances, and where one dealing in good faith with the corporation had a right to assume the existence of the conditions which would authorize the act. Where an act is not *ultra vires* for want of power in the corporation, but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons. In the more proper and legitimate use of the term, it applies only to acts which are beyond the purpose of the corporation—which could not be sanctioned by the stockholders. There would, of course, be no power to confirm or ratify a contract of that kind, because

the power to enter into it is absolutely wanting. If there is no power to make the contract, there can be no power to ratify it; and it would seem clear that the opposite party could not take away the incapacity, and give the contract vitality, by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract, by way of estoppel, through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power.

The powers delegated by the State to the corporation are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and cannot plead ignorance in avoidance of the defense. Franklin Co. v. Lewiston Inst. for Sav., 68 Me. 43; New Orleans, F. & H. S. S. Co. v. Ocean Dry Dock Co., 28 La. Ann. 173. Concerning this subject, it is said in Thomas v. Railroad Co., 101 U. S. 71: "To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law the stronger the claim to its enforcement in the courts." We quote again from Central Transp. Co. v. Pullman's Palace Car Co., as follows: "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such prerequisites might in fact have been complied with. But, when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws." See also Reese, Ultra Vires, secs. 46-72, for a full discussion of the subject. In Durkee v. People, 155 Ill. 354, 40 N. E. Rep. 626, the same rules were laid down, and it was pointed out that the cases where a corporation is estopped from asserting that a contract is *ultra vires* when it has received a benefit under the contract is where the making of the contract is within the scope of the franchise, and the contract is sought to be avoided because there was a failure to comply with some regulation, or the power was improperly exercised. The following was there quoted from the opinion in Davis v. Railroad Co., 131 Mass. 258: "There is a clear distinction, as was pointed out by Mr. Justice Campbell in Zabriskie v. Railroad Co., 23 How. 381, by Mr. Justice Hoar in Monument Nat. Bank v. Globe Works, 101 Mass. 57, and by Lord Chancellor Cairns and Lord Hatherley in Iron Co. v. Riche, L. R. 7 H. L. 653, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power or the failure to comply with prescribed formalities or regulations in a peculiar instance, when such abuse or failure is not known to the other contracting parties."

The cases in this court where the corporation has been held to be estopped have been where the act complained of was within the general scope of the corporate powers. Road Co. v. Murray, 15 Ill. 336, was a case where the corporation was expressly authorized to borrow money and to mortgage its road. Money was borrowed and received by the corporation, and a bond and mortgage were executed. The corporation sought to question the official character of the persons who borrowed the money and executed the mortgage as directors of the company. It was held that the corporation could not dispute their official relation after receiving the money. In Bradley v. Ballard, 55 Ill. 413, the North Star Gold & Silver Mining Company had given its notes for borrowed money. The court said: "The borrowing of the money was not in itself an act *ultra vires*, nor was the giving of the notes. The money was not borrowed to be used for an illegal or immoral purpose. The lenders have been guilty of no violation of law, nor wrong of any kind." The bill was filed in the case by one of the stockholders to enjoin the payment of the notes because the money was appropriated to mining in the Territory of Colorado. It was not decided whether engaging in mining in Colorado was *ultra vires* or not, but the doctrine of *ultra vires* has never been carried to the extent of requiring one who honestly lends money to a corporation authorized to borrow it to see that it is not applied to an improper purpose. The transaction was perfectly lawful, and not *ultra vires* the corporation, and the rights of the lender were maintained, with some natural and proper remarks about honesty as applied to corporations. In Darst v. Gale, 83 Ill. 136, an insurance company borrowed money which it had a right to borrow to carry on its business, and mortgaged real estate to secure its payment. A purchaser of the real estate subsequent to the trust deed, and therefore subject to it, tried to avoid the incumbrance on the ground that the

company had no right to execute the mortgage. The court said: "That in certain cases it might have lawfully done so, even against the remonstrance of those who had the right to directly interfere with its management, we think, can admit of but little controversy." It was deemed unimportant whether it was in fact necessary to make the mortgage, because, conceding that the evidence did not show such a necessity, the defense could not be availed of by the corporation, or by the purchaser, who bought with full knowledge of the trust deed. The case belongs to a class already explained. The corporation had the right to do the very thing complained of, and neither it nor the purchaser could set up that the requisite conditions for the exercise of the power did not exist. In Kadish v. Association, 151 Ill. 531, 38 N. E. Rep. 236, the court purposely avoided deciding whether corporations for manufacturing purposes could become members of homestead and loan associations, and whether such an association could loan money for general business purposes. The corporation had a right to loan money, and the loans were made to actual members. All that was insisted upon was that the borrowers, though in fact members, were ineligible to membership, and the money was applied to general business purposes. It was held that the eligibility to membership could not be questioned, nor the purpose for which the money was borrowed; and the term "*ultra vires*," as there used and defined, did not embrace unlawful acts which the corporation could not perform, as being different from the purpose of its organization and against the policy of the State. In this case the transaction was beyond the corporate powers, and *ultra vires*, in the strict and legitimate sense, and against public policy. It could not be ratified or become valid by acquiescence, since there was no power to make it. Flora D. Bishopp, who dealt with the corporation, was chargeable with notice of its powers and their limitations, and its inability to enter into the contract. She could not make the void contract valid by acting under it. No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner. The decree of the superior court against the National Home Building and Loan Association for any deficiency that may exist, and for execution to collect the same, and the judgment of the appellate court affirming said decree in that respect, are each reversed. Judgment reversed.

NOTE.—As a rule, building and loan associations possess all the attributes of corporations. First, to maintain perpetual succession. Second, to have a common seal. Third, to sue and be sued in their corporate name. Fourth, to contract, grant and receive and hold real estate, subject to the provisions of the governing statute on the subject. Fifth, to make by-laws. Whether any particular power is implied in the charter depends upon whether its exercise would be conducive to the accomplishment of the legislative intent in creating the corporation. Any act which tends to defeat the accomplishment of the object contemplated is necessarily unlawful, for "the person, whether natural or artificial, to whom the privilege is granted, is bound, upon accepting it, to render to the public that service the performance of which was the inducement of the grant, and it is because of such obligation to render service to the public that the legislature has power to make the grant." In England, societies incorporated under the Statute 6 & 7 William IV., ch. 32, may have a limited power to borrow conferred upon them by constitution or by law. Laing v. Reed, 21 L. T. (N. S.) 773. In the absence of such special provision in the constitution or by law, no such power can be implied. *In re* National Permanent Building Society, 22 L. T. (N. S.) 284. If the power so conferred is unlimited, it is held to be inconsistent with the legislative intent in creating the corporation and void. *In re* Victoria Permanent Building Society, 22 L. T. (N. S.) 777. To render the association liable in any given case under such a rule, its particular exercise must be clearly within its intendment. Thus, societies have powers of borrowing for the special purpose indicated by their constitution, if those purposes do not violate any principle of law, but those powers of borrowing can only be for those special purposes within those limits. Moye v. Sparrow, 22 L. T. (N. S.) 156. In America, the point does not seem to have arisen frequently. In Maryland notes signed and given by building associations to members, instead of money, the members giving mortgages to the building associations for the proceeds of the notes, the same as if they had received money, have been enforced and their capacity to borrow money with a view to accomplish the purposes of their incorporation expressly recognized. Davis v. West Saratoga Building Union No. 3, 32 Md. 285; Canton National Building Association v. Weber, 34 Md. 669; Jackson v. Myers, 43 Md. 452; Muth v. Dolfield, 43 Md. 466. In Pennsylvania and Ohio the power has been denied, but in the former State the point was not directly before the court, and in the latter court the facts showed that the money was borrowed by the association partly with a view of trafficing in its own stock. Stile's Appeal, 9 W. N. C. (Pa.) 83; State v. Oberlin Building & Loan Association, 35 Ohio St. 258. Under no circumstances either in the United States or in England, can the individual credit of members be pledged to lenders of money to the society, and a rule granting such power is *ultra vires*. *In re* Mutual Aid Permanent Benefit Building Society, 13 Am. & Eng. Corp. Cas. 638, L. R. 30 Ch. Div. 434. As to the investment by a building association in real estate, in England it has been held that a building society is not precluded from investing its surplus funds in the purchase of real estate. Mullock v. Jenkins, 14 Beav. 628. And where a rule of a building society directed that unemployed money should be invested "in such manner and upon such legal security" as the board of directors should deem necessary, it may be invested in freeholds. Grimes v. Harrison, 26 Beav. 43. In Pennsylvania, building and loan associations have no power to take or hold real estase beyond the limits fixed by statute. Miller's Estate, 2 Pearson (Pa.), 248; Rhoades v. Hornerstown Bldg. & Sav. Assn., 82 Pa. St. 180. And debts contracted by them in the purchase of real estate cannot be enforced against them. Faulkner's Appeal, 11 W. N. C. (Pa.) 48. As to the general powers of building associations incorporated under the general law of Alabama, to hold real estate and convey the same, see Cahill v. Citizens' Mut. Bldg. Assn., 61 Ala. 232.

JETSAM AND FLOTSAM.

REMARRIAGE AFTER DIVORCE.

Owing to some comparatively recent and notoriously shameless instances of divorce and prompt remarriage of paramours, the subject of remarriage after divorce is now receiving a large amount of attention. Of course we shall not assume to deal with the ecclesiastical or religious aspects of the matter. But, whatever else it may be, marriage is also a civil institution, and therefore a few words from the legal point of view may not be an inappropriate contribution to the general discussion. And we cannot do better than quote from a great legal text writer whose convincing arguments and authoritative name have had large influence in moulding the law laid down by the courts. In his work on Marriage, Divorce and Separation, Mr. Bishop, speaking of the policy of the disqualification of divorced persons to remarry, says: "Plainly, a person who has conducted badly in one matrimonial alliance has no claim to be protected in another; but, in divorce law, we are to consider more the interests of the public than of individuals. And all punishment, for whatever dereliction, especially therefore for a matrimonial one, should be of a sort to benefit, not prejudice, the public. So that a man who has been unfaithful to a particular marriage, if he is to be punished therefor beyond having it dissolved, should be shut up—not left at large under disabilities goading his evil nature, after having wronged one woman, to wrong as many more as he can seduce. If marriage is ever a protector of the public virtue, it is especially such when a bad man is held by the cords of a domestic affection from preying upon the female part of the community abroad. Some, indeed, apprehend the liberty of marriage to the guilty after divorce will induce those who are weary of their matrimonial connections to commit offenses for the sake of the hoped for release. But experience shows that such is not often the consequence; and no high injustice is committed if an innocent person, bound another who will do this is set free." Sec. 705.

The general argument of Mr. Bishop is very plain. Marriage, besides being in the eyes of many a religious institution, in its best estate is a union of sentiment and affection in which considerations of physical appetite and propensity are merely subsidiary. Civil policy on the subject must, however, comprehend mankind secularly, on the average and even in the rough. From this standpoint one of the grounds for encouraging marriage is the promotion of morality by minimizing the temptation to indiscriminate indulgence of passion. We concur in the author's view that the disqualification of remarriage of divorced persons tends to foster immorality.

Of course, even from the civil standpoint, there is another and a more important factor than the promotion of sexual loyalty. The State encourages marriage and frowns upon its dissolution in order to guard the institution of the family. It is at least questionable, however, whether family life, and the welfare, physical and moral, of children in the long run are disadvantaged by permitting the remarriage of divorced parents. Even in the case of a guilty spouse the influence of his example upon his children may be better if he be permitted to form a new legal union and live in outward decency than if he be tempted to live like a promiscuous animal. And, as to innocent spouses, the observation of almost any person can supply many instances of the children of former dissolved marriages living in new families of their innocent parents under conditions as favorable as those of average stepchildren.

As to the religious bearing of the marriage of divorced persons, we have only to say that we sincerely respect any person who conscientiously lives up to his religious convictions. As to the policy of the law, we certainly are of opinion that no effort should be made to change the present rule permitting innocent spouses to remarry. And the further suggestion may be offered that, even as to guilty spouses, Mr. Bishop's position has considerable force, and that the cogency of his argument on general principles may be obscured by the righteous indignation aroused by the marriages of paramours who are so conspicuous in the world as to render their conduct a universal scandal.—*New York Law Journal.*

COMPULSORY PHYSICAL EXAMINATIONS IN ACCIDENT CASES.

It is to be regretted that the Supreme Court of Illinois, in deciding the case of Chicago & Alton Ry. Co. v. Swan, 52 N. E. Rep. 916, failed to decide one point which was mentioned in the appellate court decision. 70 Ill. App. 331. The point was this: Counsel for the defendant company desired to have a physician make an examination of the plaintiff and applied to Judge Adams, then sitting in the circuit court, to make the order. The court declared that it had no power to direct the examination, and defendant's counsel excepted. At the conclusion of the testimony counsel for the defendant had it noted on the record that the defendant's counsel again requested the plaintiff to submit to a physical examination, to be made by a competent physician satisfactory to the plaintiff, which request was noted by the court, but counsel for the plaintiff replied that the request was refused by the plaintiff, because he had already submitted to several examinations, and that it would be physical torture which he does not care to endure another time to undergo the additional examination requested by the defendant. The matter was not again alluded to either in the instructions given to the jury nor in the motion for new trial, but upon appeal to the appellate court, complaint was made of it in the brief on the part of the company, in aid of an assigned error that the court erred in not requiring plaintiff at the request of the defendant to be examined by a physician in the presence of the jury.

The appellate court briefly alluded to the matter as follows: "A very plausive argument against the amount of the verdict ($14,000), is based upon the refusal of appellee to submit to further examination by medical men on behalf of the appellant, but if we were to say that because of such refusal the damages are excessive, it would be in effect to say, not that the damages are not justified by the evidence, but that part of them should be forfeited as a punishment for such refusal."

Judgment was affirmed by the appellate court and was finally affirmed in the supreme court after a rehearing. In the supreme court brief it was contended that, where in the face of irreconcilable evidence concerning the extent of the injuries, the only method of arriving at the truth is a medical examination before the jury, that such right should lie with the trial court, within its discretion under proper restrictions. It was also contended that such medical examinations should take place before the jury if the plaintiff refused to allow an examination elsewhere. It was also said that there are many things which could rightly influence a trial judge's discretion in directing such an examination, as, for instance, a suspicion of bad

faith, or an evident tendency on the part of the plaintiff to exaggerate his injuries.

The defendant's counsel conceded that the case of Parker v. Enslow, 102 Ill. 272, tended against their position, also the case of Railway Co. v. Wise, 144 Ill. 227; Railway Co. v. Call, 143 Ill. 177. It was claimed that the decisions are inconsistent with the rule laid down in City of Lanark v. Dougherty, 153 Ill. 163, where it was held to be within the discretion of the court at the plaintiff's request to permit a physician to examine the plaintiff's injured limb in the presence of the jury and testify in regard thereto. It was also said that the whole policy of modern jurisprudence is to compel an adverse party to produce evidence in his possession or under his control and that the statement of Mr. Justice Craig in Springer v. City of Chicago, 135 Ill. 552, 562, was sound in principle, and that the rule should be adopted by the supreme court as applicable to physical examinations and the right of the defendant in injury cases to compel a physical examination.

The supreme court in the Swan case contented itself with the statement that "other objections are made to the ruling of the circuit court on the trial. But we do not regard them as of substantial merit." It would seem, then, that the question is definitely settled by the refusal of the court to adopt the rule so earnestly pressed upon their attention. In view of this holding, the question is proper, whether the refusal of the party in the face of the jury may become a subject of rightful debate by counsel. It must be clear that it ought not to become a rightful subject of debate, before the jury, otherwise the defendant in every accident case would make the request, and if the request be refused, will argue the refusal to the jury as an adverse element against the plaintiff. Whatever is ruled out of evidence or is not in evidence should not become a matter of debate before the jury.

The right of physical examination is controlled in some States by statute, and the legislature is the only place where the right may be finally established under proper restrictions.—*The National Corporation Reporter.*

BOOK REVIEWS.

ABBOTT'S FORMS OF PLEADING, VOLUME 2.

We noticed volume 1 of this work in our issue of April 14 last. Those who have purchased the first volume will welcome the second. This collection of forms extends and supersedes the former volumes of Practice and Pleading, long since out of print. The plan pursued in the present work is similar to that pursued in Mr. Abbott's former work on Forms, Practice and Pleading, viz.: of presenting actual precedents with notes and sustaining authorities. In the former work the forms covered about 700 pages, while in the present work they cover 1,700 pages. In the former work the present editor also tells us the chapters of Complaints on Negligence and Nuisance contained 26 forms, and in the present volumes 151 forms are given in these two chapters. Also Creditors' Suits, old volume, 9 forms, present volumes, 40 forms; Statutory Actions, old volume, 23 forms, present volumes, 102 forms. Professor Carlos C. Alden, LLM., of the New York Bar, the editor of the present volumes, has done his work thoroughly and well, and has added much to the value of this most valuable work. Austin Abbott's reputation for work of this character was so well known that nothing we can say can heighten it. He possessed in a wonderful degree the requisite ability for compiling and selecting material for forms. Many busy lawyers can testify to the practical utility and labor saving qualities of his various books which are labor saving tools to the profession. The forms of Pleading in the present work are prepared with especial reference to the Codes of Procedure of the various States, and adapted to the present practice in many common law States. This volume 2 contains, including table of contents and index, over 1,100 pages printed on excellent paper, well bound in law sheep. Published by Baker, Voorhis & Co., 66 Nassau St., New York.

BOOKS RECEIVED.

A Handy Law Dictionary, for the Convenient Use of Students and Business Men. By C. N. Ironside, Counsellor at Law. New York: 1899.

The Journal of the Federal Convention of 1787, analyzed. By Hamilton P. Richardson, Esq., of the Wisconsin Bar. San Francisco: The Murdock Press, 1899.

A Treatise on Criminal Pleading and Practice. By Joseph Henry Beale, Jr., Professor of Law in Harvard University. Boston: Little, Brown & Company, 1899.

The Humor of the Court Room, or Jones v. Johnson. A Lawful Comedy. By Phillip Lindsley, Esq. With Illustrations by Prescott Toomey. Dallas, Texas: John F. Worley & Co., Publishers, 1899.

The Law Relating to the Custody of Infants, Including Forms and Precedents. By Lewis Hochheimer, of the Baltimore Bar. Third Edition, Baltimore, Harold B. Scrimger, 1899. Canvas, pp. 148.

HUMORS OF THE LAW.

The good advice of the Laird of Waterton, in Aberdeenshire, to a sheep stealer, reads like a very practical joke. He had himself sent the man to jail; and in those days sheep stealing was a capital offense. Visiting the prisoner the night before the trial, he asked him what he meant to do; to which the prisoner replied that he intended to confess and to pray for mercy. "Confess!" said Waterton; "what, man, will ye confess and be hanged? Na! na! deny it to my face." He did so, and was acquitted.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION—Settlement of Estates—Conclusiveness of Judgment.—Under How. Ann. St. § 5884, avoiding, as against creditors of an estate, conveyances by a deceased person to avoid debts, and authorizing the administrator to sue for the property conveyed for the benefit of creditors, a grantee who has paid the consideration before probate of the estate is not bound by the probate proceedings allowing claims of creditors, to which he was not a party, but is entitled to show, in a suit to subject the land conveyed to such claims, their invalidity.—SEYMOUR v. WALLACE, Mich., 80 N. W. Rep. 242.

2. ADMIRALTY—Maritime Liens—Jurisdiction.—A contract for repairs to a vessel, made at her home port, is maritime in its nature, and proceedings *in rem* for the enforcement of a lien given for its security by a State statute cannot be instituted before State tribunals.—STATE v. COX & SONS CO., N. J., 44 Atl. Rep. 206.

3. ARREST WITHOUT WARRANT—Void Ordinance.—Officers being authorized to make arrests without warrants only in cases of felony and breaches of the peace, the president of a village is not justified in ordering the arrest without a warrant, which could have been procured, of an ordinary vender of popcorn and peanuts, for violating an ordinance by exercising his vocation on the street without a license.—TILLMAN v. BEARD, Mich., 80 N. W. Rep. 248.

4. ASSOCIATION—By-Law in Restraint of Trade.—A by-law of an association of master plumbers of a city, which provides that each member of the association is required to report in open meeting each week what work he has done during the week, and, if it develops that such work was done in competition with any other member, the member having done the work is to pay into the treasury of the association a fixed sum, according to a schedule agreed on and made a part of the by-law, is in restraint of trade and void.—BAILEY v. ASSOCIATION OF MASTER PLUMBERS OF CITY OF MEMPHIS, Tenn., 52 S. W. Rep. 853.

5. ATTORNEYS—Admission to the Bar—Rules of Supreme Court.—Act Feb. 21, 1899, changing the rules relative to the admissions of attorneys to the bar, and providing that it shall not abridge the right of an applicant to be admitted according to the rules of the supreme court in force when he began to study law, notwithstanding any subsequent change of the rules, does not affect rules adopted by the supreme court prior to the passage of the act requiring law students to comply with different rules from those in force when they commenced their studies.—IN RE DAY, Ill., 54 N. E. Rep. 646.

6. ATTORNEY AND CLIENT.—An assignment by a client to his attorney of his interest in a decree of foreclosure will not be set aside, and the client allowed to recover the value of real estate which his attorney procured under the decree, and sold, where the evidence shows that the conduct of the attorney in securing the assignment was characterized by perfect fairness, although, owing to a particular demand for the land, he was enabled to sell it, shortly after the assignment, for a considerable advance over the price paid.—AH FOE v. BENNETT, Oreg., 58 Pac. Rep. 508.

7. BANKRUPTCY—Assets of Estate—Surplus Income of Trust.—Where trustees under a will are thereby directed to pay to a certain beneficiary, during his life, one-fourth of the income of the trust estate, with no direction for accumulation, and no discretion in the trustees as to such payment, and the law of the State (New York) provides that the surplus of an income so settled, beyond what is necessary for the support of the beneficiary, shall be liable in equity to the claims of his creditors, such surplus income, on the bankruptcy of the beneficiary, may be claimed by the trustee in bankruptcy as assets of the estate, although it is not within the classes of property enumerated in Bankruptcy Act, § 70, as vesting in the trustee, for that section is not to be construed as exclusive of other kinds of assets not therein described.—IN RE BAUDOUINE, U. S. D. C., S. D. (N. Y.), 96 Fed. Rep. 536.

8. BANKRUPTCY — Collection of Assets — Enjoining Sale under Decree Procured by Fraud.—Certain judgment creditors brought an action in a State court against their debtor and against an assignee to whom he had made a deed of assignment with preferences, and procured a decree adjudging the assignment to be null and void, as being intended to defraud creditors, establishing the liens of the plaintiffs on the property affected as prior to all others, and ordering the property to be sold. This decree was made by consent, without any opposition or contest on the part of the debtor or the assignee, and the court was not informed of the fact that the debtor had already been adjudged bankrupt and a trustee of his estate appointed, nor of the fact that all the judgments had been bought by a son of the bankrupt (and it was alleged with funds furnished by the latter) and he was the only real plaintiff. Held, that the court of bankruptcy, on petition of the trustee, would enjoin the State court's officer, the bankrupt, and all others concerned from selling the property under the decree, and instead would order it sold by the trustee free of incumbrances.—SOUTHERN LOAN & TRUST CO. v. BENBOW, U. S. D. C., W. D. (N. Car.), 96 Fed. Rep. 514.

9. BANKRUPTCY—Examination of Bankrupt—Right of Creditor to Require.—At the first meeting of creditors in a proceeding in bankruptcy, any person who is actually a creditor of the bankrupt, and whose debt is provable under the act, is entitled to examine the bankrupt, although he has not made formal proof of his claim; and the fact that his name is included in the bankrupt's list of creditors will be *prima facie* sufficient evidence of his having a provable debt.—IN RE WALKER, U. S. D. C., D. (N. Dak.), 96 Fed. Rep. 550.

10. BANKRUPTCY—Exemptions—Setting Apart.—The provisions of the bankruptcy law requiring the trustee to set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court, are mandatory, and these duties cannot be performed by anyone else; and an agreement between a bankrupt and his creditors that the exemptions shall be valued and allotted by three appraisers, whose decision shall be final, and not subject to exception, is void; and an order made by the referee, by consent of parties, in the terms of such agreement, will be set aside.—IN RE GRIMES, U. S. D. C., W. D. (N. Car.), 96 Fed. Rep. 529.

11. BANKRUPTCY—Priority of Claims—Costs of Attachment.—Where the lien of an attachment levied on personal property is dissolved by the adjudication of the debtor as a bankrupt within four months after the commencement of the attachment suit, the creditor's claim for the costs incurred in the attachment pro-

ceedings prior to the filing of the petition in bankruptcy is a provable debt, but is not entitled to priority of payment, nor is it a lien on the proceeds of the trustee's sale of the property which was attached.—IN RE ALLEN, U. S. D. C., N. D. (Cal.), 96 Fed. Rep. 512.

12. BANKRUPTCY—Sale of Property Free of Incumbrance.—A referee in bankruptcy, sitting as a court of bankruptcy, has power to order the trustee of a bankrupt to sell free of incumbrances personal property of the bankrupt in his possession, but covered by a chattel mortgage, on notice to the incumbrancer, and to approve the sale when made.—IN RE SANBORN, U. S. D. C., D. (Vt.), 96 Fed. Rep. 551.

13. BANKS—Payment of Forged Checks—Negligence of Depositor.—Where, in an action by a depositor to recover of a bank sums alleged to have been paid out by it on forgeries, it appears that the forgeries were perpetrated by a confidential clerk of the depositor, who intrusted him with the balancing of his books, and that the bank, in honoring the checks, was not negligent, it is proper to direct a judgment for the bank, as the depositor alone can be held responsible for his failure to examine the checks after payment and reject them in a reasonable time.—MYERS V. SOUTHWESTERN NAT. BANK, Penn., 44 Atl. Rep. 280.

14. BANKS AND BANKING—Checks Deposited for Collection.—Where checks are deposited with a bank for collection, and it credits them to the depositor's account as cash, and the deposit slip and pass books contain a statement that "all cash items not actual cash are entered subject to payment," the depositor cannot recover the amount of the checks when the bank, exercising ordinary diligence, fails to collect them.—GIVAN V. BANK OF ALEXANDRIA, Tenn., 52 S. W. Rep. 923.

15. BANKS AND BANKING—Payment of Check on Forged Indorsement.—A bank which pays a check on a forged indorsement must bear the loss.—HENDERSON TRUST CO. V. RAGAN, Ky., 52 S. W. Rep. 848.

16. BILLS AND NOTES—Assignments—Bona Fide Purchasers—Consideration.—Where a negotiable note was assigned to the holder by a separate instrument, and not by indorsement, such holder is not a purchaser of negotiable paper in due course, so as to estop the maker to plead the defense of failure of consideration.—HAYS V. PLUMMER, Cal., 58 Pac. Rep. 447.

17. BILLS AND NOTES—Presumptions—Right to Sue.—The possession by plaintiff, and the production at the trial, of acceptances indorsed in blank, are sufficient to warrant a presumption of his right to sue upon them, in the absence of any evidence to the contrary.—HOGAN V. DREIFUS, Mich., 80 N. W. Rep. 254.

18. BUILDING AND LOAN ASSOCIATION—Mortgage.—A foreign loan association, having taken a mortgage without complying with the laws in regard to foreign corporations, induced the mortgagor to execute a second mortgage, ostensibly that her monthly payments might be reduced, and an extension granted as to arrears but really to validate the former mortgage. Held, that equity would not decree foreclosure of the second mortgage, the extension and reduction of dues being no consideration, and its execution being obtained by false pretenses.—GILMER V. UNITED STATES SAVINGS & LOAN CO., Tenn., 52 S. W. Rep. 851.

19. CARRIERS—Passenger—Contributory Negligence.—A passenger on a railroad train operated for the accommodation of workmen, with a speed of seven miles per hour, while facing the platform on the lowest step of a car, with his hands on the railing and body projecting outside the line of the coach, while the platform was crowded with other passengers, was struck by another car, which the railroad company had negligently left near the track, and was injured. Held a question for the jury whether he was guilty of contributory negligence.—LAKE SHORE & M. S. RY. CO. V. KELSEY, Ill., 54 N. E. Rep. 608.

20. CARRIERS OF PASSENGERS—Railroad Ticket—Stipulation as to Time.—A purchaser, by accepting an ordinary railway ticket, which expresses that it is good for the passage of one person on defendant's railway, between certain points, if used within one day from date of sale, assents to the terms therein stated, and is not entitled to use it after the time limit has expired.—HANLON V. ILLINOIS CENT. R. CO., Iowa, 80 N. W. Rep. 223.

21. CERTIORARI—Review.—On *certiorari* to review a decision of the circuit court refusing to quash a writ of attachment, the proper practice is to confine the review to errors of law, and not to determine disputed questions of fact.—STATE V. BLOCK, N. J., 44 Atl. Rep. 208.

22. CHATTEL MORTGAGES—Execution by Parol.—To enforce a parol chattel mortgage, it must be such as could be enforced if it had been in writing.—MOORE V. BRADY, N. Car., 34 S. E. Rep. 72.

23. CHATTEL MORTGAGES—Mortgaged Property.—Where, in an action to foreclose a chattel mortgage on sheep, it was adjudged that plaintiff, who seized them, was not entitled thereto, and he thereupon notified the mortgagor that he held them subject to his order, but the mortgagor failed to indicate that he would accept possession, such failure constitutes an implied promise to pay the reasonable value of their keep from the time of the notice.—BANK OF IOWA AND DAKOTA V. PRICE, S. Dak., 80 N. W. Rep. 195.

24. CONSTITUTIONAL LAW—Statutes—Compensation of Public Officer.—Act March 3, 1899, creating the office of county road supervisor, and lessening the duties and compensation of county surveyors, does not, as applied to an incumbent at the time it went into effect, violate Const. art. 5, § 31, ordaining that no law shall increase or diminish the salary, or emolument of any public officer after his election or appointment.—STATE V. BOARD OF COMMRS. OF GRANITE COUNTY, Mont., 58 Pac. Rep. 439.

25. CONTRACTS—Partial Performance.—In an action to recover for lumber delivered under a contract for a greater quantity, for which defendant was to pay as it was loaded on the cars, it is error to grant a nonsuit because the contract was entire, where plaintiff excused his failure to deliver the full quantity by alleging defendant's rescission by failing in his payments.—EASON V. JONES, Penn., 44 Atl. Rep. 264.

26. CONTRACT—Rescission—Fraud—Laches.—In an action by the vendors to rescind a sale of real estate on account of the fraud of the vendees and of the vendors' own agent, and to compel the vendors to reconvey the property and to account for the proceeds of such of the property as the vendors had sold. Held, that an unexcused delay by the vendors, after discovery of the facts constituting the fraud, of five years and three months, before rescinding or making any attempt to rescind, amounted, under the circumstances, to a waiver of the right to rescind, and to an implied ratification of the contract, notwithstanding the fraud.—MCQUEEN V. BURHANS, Minn., 80 N. W. Rep. 201.

27. CONTRACTS—Sale of Stocks—Specific Performance.—A contract for the sale of stock of a corporation, which is to be binding on the buyer provided his examination of the books of the company shall be satisfactory and prove the correctness of a covenant as to its earnings, is not void for want of mutuality, as not necessarily binding on the buyer, since, if he refused to take the stock on a tender by the seller, specific performance could be decreed against him.—NORTHERN CENT. R. CO. V. WALWORTH, Pa., 44 Atl. Rep. 253.

28. CORPORATIONS—Authority of Agent.—A corporation may act by its agents without giving them authority in writing. It may be bound by acceptance and ratification of the previously unauthorized acts of its agents in the course of its business.—FLAHERTY V. ATLANTIC LUMBER CO., N. J., 44 Atl. Rep. 186.

29. CORPORATIONS—Creation of Debts in Excess of Limit.—Creditors of a corporation, who, as directors, have permitted the corporation to become indebted in excess of the limit prescribed by its articles, must be

postponed to other creditors, who had no notice of the financial condition of the corporation when their debts were created.—GUENTHER v. BASKET COAL CO., Ky., 52 S. W. Rep. 931.

30. CORPORATIONS—Payment of Debts by Stockholder.—Where a stockholder of a State bank advances his own funds to pay the debts of the bank, in pursuance of an agreement of the stockholders that each should contribute in proportion to the number of shares of stock held by him, the advancing stockholder may maintain an action against the other stockholders for an accounting and contribution without having first exhausted the assets of the bank.—DAVIDSON v. GRETNA STATE BANK, Neb., 80 N. W. Rep. 256.

31. CORPORATIONS—Receivers - Distribution of Funds.—A creditor, in a proceeding for the distribution of the assets of a corporation, cannot impeach its title for irregularities in the organization proceedings, as such questions can only be raised by proceedings in the nature of a *quo warranto* to forfeit its charter.—HOOVER MERCANTILE CO. v. EVANS MIN. CO., Penn, 44 Atl. Rep. 277.

32. CORPORATIONS—Validity of Existence—Fac Simile of Seal.—The validity of a corporation's existence cannot be attacked on the ground that the certificate of registration given by the secretary of state was not registered in the register's office of the county in which the principal place of business of the corporation is situated, with the fac simile of the great seal of the State, as required by law (Shannon's Code, §§ 2026, 2542), where it appears that the certificate was registered, but the fac simile of the seal not accurately drawn.—CARPENTER v. FRAZER, Tenn., 52 S. W. Rep. 858.

33. COUNTIES—Powers of Fiscal Court.—Act April 18, 1892, vesting in the fiscal court of each county power to levy taxes for county purposes, did not repeal by implication a special act of the legislature giving commissioners for a separate district of a county the power to levy a tax to pay a debt incurred for the benefit of such district, there being no irreconcilable conflict.—MAUGET v. PLUMMER, Ky., 52 S. W. Rep. 844.

34. CRIMINAL LAW—Bail—Evidence.—In an application for bail under an indictment for a capital offense, it devolves upon the accused to take the initiative, and show from the testimony in the case, including that of the State, that the proof is not evident, nor the presumption great.—RIGDON v. STATE, Fla., 26 South. Rep. 711.

35. CRIMINAL LAW—Burglary.—It is no defense for breaking and entering a store that the owner was informed the day before that the crime was going to be committed, and was requested to watch for and aid in catching the offender, which he did, if he did not assent to the crime, though he did not object to it.—STATE v. ABLEY, Iowa, 80 N. W. Rep. 225.

36. CRIMINAL LAW—Conspiracy—Evidence.—Where accused persons entered into one general conspiracy to accuse various other persons of offenses of keeping bawdy houses for the purpose of extorting money, and in pursuance of the conspiracy did so accuse such other persons and extort money from them, neither a conviction of such accused persons upon a charge for the conspiracy, nor an acquittal upon a charge of maliciously verbally threatening to accuse one of their victims of the offense of keeping a bawdy house for the purpose of extorting money, constitute any defense to a charge of maliciously verbally threatening to accuse another of their victims of the offense of keeping a bawdy house for the purpose of extorting money, because the offenses are entirely separate and distinct.—WALLACE v. STATE, Fla., 26 South. Rep. 718.

37. CRIMINAL LAW—Indictment—Grand Jury.—Under Code, § 5373, requiring notice of production of witness not examined before the grand jury to state his occupation, a variance is not fatal to his competency, unless accused is prejudiced; and where the notice stated he was a laborer, and he stated he was a soldier, the court should permit the State to show that he was a laborer before enlistment; that he and accused had lived in the same village for a long time, and were acquainted; and that there was no one else of the same name there.—STATE v. DALE, Iowa, 80 N. W. Rep. 208.

38. CRIMINAL LAW—Rape—Assault and Battery.—Under Shannon's Code, § 6459, which punishes the commission of an assault and battery with intent to commit rape, an indictment which charges that the defendant, with such intent, committed an assault upon a female, and her did "ill treat," but charges no battery, is insufficient.—WILSON v. STATE, Tenn., 52 S. W. Rep. 869.

39. CRIMINAL PRACTICE—Homicide—Assault With Deadly Weapon.—Where an indictment charges an assault with a named weapon, without designating the manner of its use, it is the proper function of evidence to supply the particulars by pointing out the specific manner in which the weapon was used to accomplish the alleged assault.—PETERSON v. STATE, Fla., 26 South. Rep. 709.

40. DECREE—Husband and Wife—Alimony—Interest.—A decree awarding a wife temporary alimony in a suit for separate maintenance is a decree for the payment of money, within Hurd's Rev. St. 1897, p. 973, providing that a money decree shall bear interest.—HARDING v. HARDING, Ill., 54 N. E. Rep. 604.

41. DEEDS—Acceptance by Husband for Wife.—The acceptance by the husband of a deed conveying to the wife land for which he had paid was an acceptance by the wife, whether she assented to it or not.—JONES v. HIGHTOWER, Ky., 52 S. W. Rep. 826.

42. DEED—Acknowledgment by Wife.—Testimony of a wife alone, that she did not acknowledge the execution of a trust deed to be her free act and deed, is not sufficient to contradict a notary's certificate thereon to that effect.—SHELL v. HOLSTON NAT. BLDG. & LOAN ASSN., Tenn., 52 S. W. Rep. 909.

43. DEED—Cancellation—Undue Influence.—The mere fact that the grantee was the medical adviser of the grantor when the deed was executed does not conclusively show undue influence, so as to require setting the deed aside, but the suspicion arising may be removed by other evidence.—KELLOGG v. PEDDICORD, Ill., 54 N. E. Rep. 623.

44. EVIDENCE—Injuries—Res Gestæ.—The plaintiff was struck by a street car, and about 15 minutes was occupied in extricating and caring for him at the place of the accident, when the motorman stated that he saw plaintiff, but thought he would get off the track. Held, that the statement was no part of the *res gestæ*.—CITIZENS' ST. R. CO. v. HOWARD, Tenn., 52 S. W. Rep 864.

45. EXECUTION SALE—Merger of Judgment—Collateral Attack.—A judgment debtor sold two pieces of land, on each of which a judgment was a lien, to different persons, and afterwards the grantee of one piece took an assignment of the judgment, and thereafter assigned it to another, who caused execution to be levied on the other piece of land, and such land sold. Held, that the sale was not void because of a merger of the judgment, but, at most, voidable, and open to collateral attack.—CLARK v. GLOS, Ill., 54 N. E. Rep. 631.

46. EXECUTION SALE—Husband and Wife.—Where an execution on a judgment against a wife was not levied on property formerly owned by her husband until after his death, she being presumptively the owner of one-third of the property, a certificate of sale under such judgment is not void on its face, since, in order to defeat the wife's claim to the property, one claiming under her husband would be compelled to show a conveyance by him during his lifetime.—BRACE v. VAN EPS, S. Dak., 80 N. W. Rep. 197.

47. FRAUDULENT CONVEYANCE—Pleading.—The mere fact that one to whom debtors made a deed in trust for certain creditors, with power to sell publicly or privately to the wives of the debtors the property in which they had carried on their business, at a price little above the lien on it, it appearing that the holder

of the lien refused to take it in satisfaction of the secured debt, does not of itself show that the trustee was cognizant of, or a party to, the fraud of the debtors in making the conveyance.—ALSOP v. CATLETT, Va., 34 S. E. Rep. 48.

48. HABEAS CORPUS — Contempt.—Where one imprisoned for contempt sues out a writ of *habeas corpus*, the court before whom such writ is returnable may examine into the acts constituting the alleged contempt; and, if they do not in law constitute a contempt, the court committing the prisoner acted without jurisdiction, and the prisoner should be discharged.—MISKIMINO v. SHAVER, Wyo., 58 S. W. Rep. 411.

49. HABEAS CORPUS — Custody of Infant.—In determining the custody of an infant child, the controlling question by which the court must be guided is the interest and welfare of the child.—MCKERCHER v. GREEN, Colo., 58 Pac. Rep. 406.

50. HOMESTEAD—Mortgages—Acknowledgment.—The homestead of a married woman cannot be incumbered by a mortgage which is not acknowledged by both the husband and wife.—COUNCIL BLUFFS SAV. BANK v. SMITH, Neb., 80 N. W. Rep. 270.

51. HUSBAND AND WIFE — Separate Maintenance.—Where a wife brings action for separate maintenance under Civ. Code, § 137, which provides for separate maintenance on grounds of desertion, and a judgment in her favor is found under *Id.* § 136, which provides for separate maintenance where divorce is denied, such judgment will not be reversed, where the findings are in the wife's favor, although the judgment might have been founded upon the section under which the action was brought.—SWEASEY v. SWEASEY, Cal., 58 Pac. Rep. 456.

52. INDIANS — Citizenship.—A child who is the offspring of a white father and an Indian woman is not by birth an Indian, but is a citizen of the United States, and is not entitled to the benefit of the act of congress of February 8, 1887.—KEITH v. UNITED STATES, Okla., 58 Pac. Rep. 507.

53. INFANTS — Declarations against Interest.—When an infant becomes a party to an action, the same species of evidence is received against him as though he were an adult; and the mere fact that the court rules that he does not understand the nature of an oath will not authorize the rejection of the declarations of an infant plaintiff against his interest. His declarations are to be cautiously received, but the value and force of the same are necessarily left to the determination of the jury.—ATCHISON, ETC. RY. CO. v. POTTER, Kan., 58 Pac. Rep. 471.

54. INJUNCTION—Sale for Special Assessment.—Where a property owner had notice of an application for a judgment against his property for a special assessment, and for a judgment for sale of such property, he had an adequate remedy at law, in that he might have appeared, and contested such application; and hence he cannot have the sale under such judgments enjoined.—SMITH v. KOCHERSPERGER, Ill., 54 N. E. Rep. 614.

55. INJUNCTION BOND—Counsel Fees.—Counsel fees are not allowable under an injunction bond conditioned, in the words of the statute, "to pay all such costs as may be awarded against the said plaintiff, and all such damages as shall be incurred in case the said injunction be dissolved."—WISECARVER v. WISECARVER, Va., 34 S. E. Rep. 56.

56. INSURANCE—Change of Beneficiary—Vested Interest.—A certificate issued by a beneficial insurance association upon the life of a member, in favor of a third person, where neither the constitution or by-laws of the society nor the certificate confers upon the members a power to change the beneficiary, invests the beneficiary with a vested interest in the certificate.—LOCOMOTIVE ENGINEERS' MUT. LIFE & ACC. INS. ASSN. v. WINTERSTEIN, N. J., 44 Atl. Rep. 199.

57. INTOXICATING LIQUORS—Injunction — Nuisance.—Injunction will not run against a person for the mere selling of liquor in violation of law, independent of the place where it is sold, and hence will be refused where the evidence does not show illegal sales in the place sought to be enjoined when suit was commenced.—STATE v. FRAHM, Iowa, 80 N. W. Rep. 209.

58. INTOXICATING LIQUORS — Proceeding for Destruction.—The presumption arising under Code, § 2427, from evidence that liquor was found on certain premises, that it was kept for illegal sale, cannot be overcome by proof that the owner of the premises did not thus keep it, where he claims it as bailee, but it must also be shown that no one kept it for that purpose.—STATE v. INTOXICATING LIQUOR, Iowa, 80 N. W. Rep. 230.

59. JUDGMENTS—Estoppel.—A plea of a former judgment only works an estoppel as to those matters capable of being controverted between the parties at the time of the proceedings in the former action.—MERSHON v. WILLIAMS, N. J., 44 Atl. Rep. 211.

60. JUDGMENTS — Liens—Execution.—Judgments not being liens on after-acquired lands, that execution which is first levied will prevail.—SHERRARD'S EXRS. v. JOHNSON, Pa., 44 Atl. Rep. 252.

61. JUDGMENT — Non Joinder of Partners. — Under Practice Act, § 11, providing that where several joint debtors are sued, and any of them are not served, a judgment against those served shall not bar a recovery against any not served, in any county other than where the first suit was brought, a judgment in another State against one member of a firm on a partnership debt is not a bar to a suit in this State on the same debt against another member of the firm, who was a party to the suit in the other State, but was not served therein because of his non-residence.—FINCH v. GALLIGHER, Ill., 54 N. E. Rep. 611.

62. JUDGMENTS—Rendition—Collateral Attack.—In an action on a judgment, defendant cannot attack it collaterally on the ground that the claim on which it was based had been satisfied prior to its rendition.—HYDER v. SMITH, Tenn., 52 S. W. Rep. 884.

63. JUDGMENTS—Res Judicata.—Where plaintiff alleged a non-divisible cause of action for a single negligence, in two counts, one of which was struck out on the trial, and a judgment recovered on the other was reversed on appeal, such judgment is conclusive, and plaintiff cannot again sue for the negligence set up in the count struck out.—JUNGNITSCH v. MICHIGAN MALLEABLE IRON CO., Mich., 80 N. W. Rep. 245.

64. JUDGMENT—Vacating.—The defendant in a judgment on a note held by plaintiff as collateral security cannot, as to plaintiff, have the judgment vacated on the ground that he had, before suit was instituted, paid the note to the payee without notice of its transfer, and was induced by the fraudulent representations of the payee, his co-defendant, to refrain from making defense.—MITCHELL v. KINNAIRD, Ky., 52 S. W. Rep. 830.

65. JUDICIAL NOTICE—Town Ordinances.—A town or city court takes judicial notice of the ordinances of the municipality, and stands in the same relation to them as the State court to public statutes.—INCORPORATED TOWN OF SCRANTON v. DANEBAUM, Iowa, 80 N. W. Rep. 221.

66. JUSTICE OF PEACE—Adjournment.—A justice of the peace cannot adjourn a cause after its trial has begun, and all of the plaintiff's witnesses have been examined and plaintiff has rested, if objection is made; and, if he does, all subsequent proceedings are *coram non judice* and void.—STATE v. MERCANTILE SAFE DEPOSIT CO., N. J., 44 Atl. Rep. 199.

67. LANDLORD AND TENANT—Action on Lease—Non Est Factum.—Where, in an action against a city on a lease, it pleads *non est factum*, if the proof shows the execution of the instrument by the parties, the power to make it cannot be questioned; and, if the lease was executed in proper and legal form, and by the proper officers, under the corporate seal, it was admissible in evidence.—CITY OF CHICAGO v. ENGLISH, Ill., 54 N. E. Rep. 609.

68. LIBEL—Probable Cause.—Where, in an action for libel, the defense of probable cause is not clearly established by competent evidence, it is error to withdraw the case from the jury, and enter a verdict for defendant.—BRYANT v. PITTSBURG TIMES, Penn., 44 Atl. Rep. 251.

69. LIBEL AND SLANDER—Privileged Communication.—Where the cashier of a bank indorsed upon a note held by the bank for collection the words, "Never signed a note; fraud, forgery," etc.—intending thereby, in accordance with the custom of banks, to give the reason assigned by the payor for refusing payment—and returned the note to the holder's agents, the words were privileged.—CALDWELL v. STORY, Ky., 52 S. W. Rep. 850.

70. LIFE INSURANCE — Conditional Application. — Where an application for life insurance was made on condition that the applicant was not bound to take the policy when it should come, if one should be issued, and the applicant died after the policy was issued, but before it was delivered, there was no contract, and the company is not liable, notwithstanding the undisclosed intention of the applicant to accept the policy.—DICKERSON'S ADMR. v. PROVIDENT SAVINGS LIFE ASSUR. SOC., Ky., 52 S. W. Rep. 825.

71. LIMITATIONS.—The statute of limitations does not run against a debt acknowledged in a codicil, and there directed by testatrix to be paid by her executor on the death of her sister, till the sister's death.—PERKINS v. SEIGFRIED'S ADMR., Va., 34 S. E. Rep. 64.

72. MARRIAGE—Common-Law Marriage.—A man told a woman, in whose room he was, that he was going to stay with her all night. She told him to "wait until we are married." He then lifted his hand and said they were man and wife. She replied that, "if he was to stay in that manner, certainly I would let him stay." Held, that the woman's statement was not equivalent to a promise to become the man's wife—a requisite of a common-law marriage.—MCKENNA v. MCKENNA, Ill., 54 N. E. Rep. 641.

73. MASTER AND SERVANT—Grounds for Discharge.—Where an employee who had agreed to work faithfully for his employer's interest endeavored to secretly examine their books, to which he had no right of access, such act was a breach of his contract, and his employers, acting in good faith, were entitled to discharge him.—ALLEN v. AYLESWORTH, N. J., 44 Atl. Rep. 178.

74. MECHANIC'S LIEN.—If a workman or material-man give notice for more than is due to him from the contractor, he is not entitled to have the owner retain for him from the contract price. If he give notice for a less sum than is due him, he will be held to have waived his claim for the difference between the sum demanded and the sum actually due, and his notice for the lesser sum, if otherwise in conformity to the statute, will be sustained.—DONNELLY v. JOHNES, N. J., 44 Atl. Rep. 180.

75. MECHANIC'S LIEN—Public Buildings.—In the absence of express statutory authority, there can be no mechanic's lien on the buildings of the State university; they being public property; the university being established by the legislature; the money to buy the land, erect the buildings, and permanently endow it being appropriated by the legislature; annual appropriation being made to it; all children of the State, within certain limitations, being entitled to free tuition; and it being controlled by the State through a public corporation, the "vistors" composing which are appointed by the governor, and have to make an annual report to, and are subject to the control of, the legislature, and are prohibited from contracting any debts without its consent; and it is immaterial that by a special act the corporation is authorized to borrow money and secure the same on the property, and to erect buildings in place of some destroyed by fire, and that the lien is claimed on the buildings thus erected.—PHILLIPS v. RECTOR, ETC., OF UNIVERSITY OF VIRGINIA, Va., 34 S. E. Rep. 66.

76. MINES — Lease — Removal of Improvements. — Where a lease of a coal mine and improvements, exclusive of appliances for moving coal, recites that all repairs are to be made by lessees, and any improvements made by them are to remain at its expiration, they cannot be restrained from removing a hauling system, introduced instead of other appliances for removing coal, as the agreement relates to the things leased, which were to be kept in repair, and to which improvements were to be added.—BEECH CREEK COAL & COKE CO. v. MITCHELL, Penn., 44 Atl. Rep. 245.

77. MORTGAGES—Insurance.—A mortgage provided that the mortgagor should keep the mortgaged buildings insured, and out of the proceeds of the mortgage sale were to be paid all moneys advanced for taxes, assessments and "other liens." Held, that the mortgagee was not entitled to repayment of insurance paid by him.—CULVER v. BRINKERHOFF, Ill., 54 N. E. Rep. 585.

78. MORTGAGE—Release.—The release of a mortgage by one who is not the owner of the debt, although possessed of apparent authority to enter satisfaction, is ineffective, except as to those who deal with the property relying in good faith upon such release.—WHITNEY v. LOWE, Neb., 80 N. W. Rep. 266.

79. MORTGAGE—Right to Rents and Profits.—A mortgagor of real estate is ordinarily entitled to the possession thereof until confirmation of foreclosure sale, and by reason thereof has a proprietary interest in the rents and profits.—CLARK v. MISSOURI, K. & T. TRUST CO., Neb., 80 N. W. Rep. 257.

80. MUNICIPAL CORPORATIONS — Change of Street Grade—Damages.—In an action for damages caused to adjacent property by changing the grade of a street, the fact that plaintiff has only such an interest in the lands injured as an upland owner of tide-water has in the flats in front of his upland should not be considered in estimating damages, but damages should be estimated by the difference in value of the property before and after the grade was changed.—NEW HAVEN STEAM SAWMILL CO. v. CITY OF NEW HAVEN, Conn., 44 Atl. Rep 233.

81. MUNICIPAL CORPORATIONS—Changing Grade of Street—Damages.—In an action against a city by the lessee of a ball park for damages for injury to the leased premises caused by a change of grade in adjacent streets, it is error, in fixing the value of the property before the change, to add to the value of the physical property the anticipated profits for the remainder of the lease, since the business to be done in the future with property injured under the power of eminent domain is too uncertain to be considered as an element of its present value.—PHILADELPHIA BALL CLUB v. CITY OF PHILADELPHIA, Penn., 44 Atl. Rep. 265.

82. MUNICIPAL CORPORATION — Contract — Paving Street.—A contract for paving a city street and keeping it in repair for five years examined, and the agreement to repair construed to be a guaranty of the quality of the workmanship and material used in paving, and not a general obligation to make street repairs, irrespective of the causes making them necessary.—CITY OF KANSAS CITY v. HANSON, Kan., 58 Pac. Rep. 474.

83. MUNICIPAL CORPORATIONS—Dangerous Premises.—A municipal corporation is liable for the death of a child who was drowned in a pond of water situate in part on a public street and part on abutting lots, when shown that the accumulation of water was occasioned by the negligence of the city in filling in the street with earth, that no fence or barrier was erected, and that the child entered the pond from the street.—BOWMAN v. CITY OF OMAHA, Neb., 80 N. W. Rep. 259.

84. MUNICIPAL CORPORATIONS — Regulating Use of Street—Ordinances.—Where the statute authorizes the common council of a city to enact ordinances, and to provide penalties for the violation thereof, by a fine not exceeding a certain sum, or imprisonment not exceeding a certain period, the specific fine and the spe-

cific imprisonment must be fixed by the council in such ordinance; and this power or discretion cannot be delegated to the magistrate or court before whom proceedings are taken to punish summarily the offender for a violation of such ordinance.—STATE v. CITY OF CAPE MAY, N. J., 44 Atl. Rep. 209.

85. NEGLIGENCE—Contributory Negligence.—In an action by a pedestrian to recover for personal injuries resulting from a collision with defendants' coasting sled on a public street, where the evidence shows that the coaster had attained a very high speed, whether the defendants were negligent is for the jury.—BURT v. STAFFELD, Mich., 80 N. W. Rep. 236.

86. NEGLIGENCE—Duty as to Insulation of Wires.—An electric company is bound to make perfect the insulation of its wires at points where persons are liable to come in contact with them, and to use the utmost care to keep them in safe condition.—SCHWEITZER'S ADMR. v. CITIZENS' GENERAL ELECTRIC CO., Ky., 52 S. W. Rep. 830.

87. NEW TRIAL—Misconduct of Juror.—A new trial will not be granted on account of the misconduct of a juror in giving out, during the deliberations of the jury, information as to how the jury stood; there being no objection at the time, and nothing to show that the unsuccessful party and his counsel did not know of the misconduct complained of.—DRAKE v. DRAKE, Ky., 52 S. W. Rep. 846.

88. NUISANCE — Waiting Room.—Where a waiting room is erected in the streets of a city by the authority of the council thereof, it cannot be abated as a nuisance, on the complaint of an abutting lot owner, for the reason that said building partially obstructs the view of his business house by persons passing over a particular portion of the street.—CUMMINS v. SUMMUNDUWOT LODGE, NO. 3, I. O. O. F., Kan., 58 Pac. Rep. 486.

89. PARTIES—Error—Effect of Decree.—Where those to whom an estate belongs, subject to the use of another, are not made parties to, or given notice of, a bill in chancery, under which there is a decree issued appointing the administrator as trustee of the estate, such decree is without authority, and does not devest the probate court of its jurisdiction over the estate and the administrator.—LOOK v. DURFEE, Mich., 80 N. W. Rep. 252.

90. PARTITION OF MORTGAGED LAND—Effect of Decree.—The effect of a final decree in a partition suit involving mortgaged premises is to settle the mortgage lien upon the specific land set off to the mortgagor and release the lien from land set off to the other owners.—ROCHESTER LOAN & BANKING CO. v. MORSE, Ill., 54 N. E. Rep. 628.

91. PAYMENT — Presumption — Executors.—The only debt of testatrix, whose estate was a considerable one, being paid by her executor, will be presumed to have been paid with her money, not his.—IN RE ORNE'S ESTATE, Penn., 44 Atl. Rep. 287.

92. PRINCIPAL AND SURETY — Liability of Surety.—A receiver was appointed as successor of a deceased receiver, under a decree ordering him to collect the balance of a certain debt due, and disburse the same according to the directions of a prior decree, after having executed and filed a bond with surety "for the faithful discharge of his duty under this and all future orders of this court in this cause." He afterwards filed a bond conditioned as required, collected and disbursed the money on the debt specified, but defaulted as to funds collected from the estate of the former receiver under a subsequent decree. Held, that such bond did not cover moneys that came into his hands under the latter decree.—AYERS v. HITE'S INFANTS, Va., 34 S. E. Rep. 44.

93. PROCESS—Service of Summons.—Section 49 of our practice act provides that the service of summons upon a defendant shall be made either upon him in person or by leaving it at his dwelling house or usual place of abode. Held, that the dwelling house or usual place of abode of a defendant, within the meaning of the statute, is the place where he is actually living at the time when the service is made.—MYGATT v. COE, N. J., 44 Atl. Rep. 198.

94. PURCHASER WITHOUT NOTICE — Record.—Plaintiff contracted with K, in writing, for the conveyance of a half interest in certain mining claims owned by K. Plaintiff claimed that the North Star claim was omitted from the contract by mutual mistake. K conveyed his entire interest in some of the above claims, including the North Star, to defendant. Before receiving the conveyance, defendant consulted the contract between plaintiff and K, which had been recorded. Defendant did not know that plaintiff claimed a right in said property on the ground of an uncorrected mistake. Held, that defendant purchased without notice of plaintiff's claim, and was unaffected thereby.—ANNIE C. GOLD-MIN. CO. v. MARKS, Colo., 58 Pac. Rep. 404.

95. QUIETING TITLE.—Where D, though having the legal title to land, held it as trustee for plaintiff, and conveyed it to him, but before the deed was recorded defendant commenced action against D, attached the land, and filed *lis pendens*, recovered judgment, and threatened to sell the land on execution, there is a right of action, under Comp. Laws, § 4644, providing that a written instrument, in respect to which there is "a reasonable apprehension that, if left outstanding, it may cause serious injury" to a person against whom it is void, may, on application, be ordered to be canceled.—HALE v. GRIGSBY, S. Dak., 80 N. W. Rep. 199.

96. RAILROAD COMPANIES—Contributory Negligence.—Where the statutory signals were given on the approach of a railroad train to a crossing, a proper lookout was kept, and, when a person approaching the crossing on the highway came into view from behind an obstruction, alarm whistles were at once sounded, and the brakes promptly and effectively applied, all possible means had been employed to avert a collision, as required by the statute, and the railroad company cannot be held chargeable with negligence.—ARTENBERRY v. SOUTHERN RY. CO., Tenn., 52 S. W. Rep. 878.

97. RAILROAD COMPANIES—Joint Liability for Torts.—Railroad corporations created by concurrent legislation of two or more States, having a joint interest in the operation of the entire line of road extending through or into such several States, are jointly liable for a tort committed in its operation in either State.—SMITH v. NEW YORK, ETC. R. CO., U. S. C. C., D. (Mass.). 96 Fed. Rep. 504.

98. RELIGIOUS SOCIETY—Church Property — Adverse Possession.—Title to church property of a congregation that is divided is in that part, though a minority, which is in harmony with its own laws, usages, and customs, as accepted by the body before the division, and which adheres to the regular organization.—BOSE v. CHRIST, Penn., 44 Atl. Rep. 240.

99. RELIGIOUS SOCIETIES — Liability of Members.—A member of an unincorporated religious society, not founded for the purpose of gain or pecuniary profit, is not individually liable for its debts, unless he authorized the incurring of the obligation or subsequently ratified the same.—FIRST NAT. BANK OF PLATTSMOUTH v. RECTOR, Neb., 80 N. W. Rep. 269.

100. RES JUDICATA — Decree Determining Rights of One not a Party.—Where, in a creditors' suit, the circuit court decreed that a conveyance of property by the debtor to a co-defendant be set aside as in fraud of complainants' rights, subject to a lien on the property by a third person for money advanced toward the erection of a building thereon after the conveyance, which decree was affirmed by the circuit court of appeals, the question of the right of such third person to a lien is *res judicata* in the suit, and cannot be reopened by a supplemental bill, though such third person was not a party to the original bill or the decree.—VOORHEIS v. BLANTON, U. S. C. C., W. D. (N. Car.), 96 Fed. Rep. 497.

101. SALES—Right of Seller to Resell—Warehouse Receipts.—Where the buyer of whisky failed to pay a

draft for the price, to which warehouse receipts for he whisky were attached, the seller and the bank holding the draft had the right to treat the purchase as abandoned, and to resell the whisky.—DOHERTY v. MERCHANTS' NAT. BANK, Ky., 52 S. W. Rep. 832.

102. SCHOOLS AND SCHOOL DISTRICTS—Buildings.—A school district which does not own a school house may, at a special meeting, duly called, select a building in which to hold school, and directs its board to lease the building selected; and *mandamus* will lie to compel the board to execute its command.—KRULL v. STATE, Neb., 80 N. W. Rep. 272.

103. TAXATION—Exemptions.—Where an absolute exemption from taxation is granted by the legislature to members of a certain class, the failure of a member of such class to communicate to the taxing officers the existence of the facts which entitle him to the immunity granted does not afford a valid ground for refusing to set aside a tax assessed against him.—STATE v. HANCOCK, N. J., 44 Atl. Rep. 207.

104. TAXATION—Public Uses—Uniformity.—"An act providing for the taxation of contracts of insurance made with insurance companies not authorized to do business in Kansas, and providing for the enforcement thereof" (Laws 1899, ch. 249), in part authorizes the imposition of a tax for other than public purposes. It is also a distinct departure from the constitutional rule of uniformity and equality, and is invalid.—IN RE PAGE, Kan., 58 Pac. Rep. 478.

105. TRESPASS—Fraud—Evidence.—A miner employed at a certain amount per ton for coal mined cannot recover damages in trespass for fraud, in that scales were used which did not show the full weight of the coal, on mere insinuations and suspicions, but there must be clear and satisfactory evidence that the employer knowingly and fraudulently used false weights with intent to cheat and defraud the miners.—NELSON v. STEEN, Penn., 44 Atl. Rep. 247.

106. TRIAL—Lost Writing—Burden of Proof.—Where the action of the plaintiff and his right to recovery are founded upon a contract or promise in writing under the statute of frauds, which contract or promise has been lost, and the evidence of the execution and existence of the same is in dispute, it is error for the trial court to refuse to charge, upon request, that the burden of proof is upon the plaintiff to establish the execution and contents of such contract or promise by a preponderance of proof, and for such error the judgment will be reversed, and new trial ordered.—GALLAGHER v. MCBRIDE, N. J., 44 Atl. Rep. 208.

107. TRUST—Resulting Trust—Lands Bought With Partnership Funds.—Where one partner buys land with partnership funds, and takes the title in his own name, a trust results in the lands in favor of the other partner to the extent of his interest in the moneys paid for the lands.—CRONE v. CRONE, Ill., 54 N. E. Rep, 605.

108. VENDOR AND PURCHASER—Contract of Sale.—A contract for the sale of lands is void unless the contract or some note or memorandum thereof is in writing signed by the owner, or his agent authorized in writing.—SOWARDS v. MOSS, Neb., 80 N. W. Rep. 268.

109. VENDOR AND PURCHASER—False Representations.—False representations, made at an auction sale of town lots, do not entitle the purchaser to a rescission, where the circumstances were such as to justify a belief in their truth.—GILL v. ANGLO-AMERICAN ASSN., Ky., 52 S. W. Rep. 329.

110. VENDOR AND PURCHASER—Sale of Land—Rescission.—A vendor of land seeking a rescission of his contract of sale must refund the purchase money received by him thereunder.—YAW v. ROBERTS, Kan., 58 Pac. Rep. 490.

111. VENDOR'S LIEN—Right to Enforce as Against Bona Fide Purchaser.—Where defendant purchased real estate from complainant's vendee, who was in possession at the time under a deed from complainant conveying title in fee, reciting that part of the purchase money was paid in cash, and the balance was evidenced by two notes, the last of which had matured four years before defendant's purchase, which was made in good faith and without actual notice that said notes were unpaid, complainant cannot enforce his vendor's lien against such real estate.—ROBINSON v. OWENS, Tenn., 52 S. W. Rep. 870.

112. WAREHOUSE RECEIPT—Negotiability.—D, as the managing officer of defendant company, had authority to issue warehouse receipts to himself or others for grain stored in the elevator. He issued a receipt to plaintiff, as security for a loan for grain he represented he owned therein. Held said receipt is negotiable paper issued within the apparent scope of D's authority, and the defendant is liable thereon.—SMITH v. CAPITAL ELEVATOR CO., Kan., 58 Pac. Rep. 483.

113. WATERS—Riparian Rights—Prior Appropriation.—A lower riparian owner cannot acquire by prior appropriation the right to all the waters of a stream, as against an upper proprietor who held title to his land before such appropriation was made.—BATHGATE v. IRVINE, Cal., 58 Pac. Rep. 442.

114. WILLS—Construction.—Under a will giving to testator's wife "all the residue of my estate, including all my property, both real, personal, or mixed, to have and to hold and dispose of as she may see fit, while she remains single, and at her death or marriage, the remaining property is to be equally divided between my two daughters," the widow takes only a life estate in the realty, with no power to dispose of the reversion.—RUSSELL v. WERNTZ, Md., 44 Atl. Rep. 219.

115. WILLS—Construction—Distribution of Estate.—Testator directed his estate to be held in trust for the benefit of his brother and sister, declaring that they "shall receive the income absolutely and the survivor of them, with power to them or the survivor of them to devise by any last will and testament they or either of them may choose to make." Both beneficiaries survived the testator, and the brother died testate as to his interest. Held, that the intention of the testator was to divide the income equally between the brother and sister during life, and on the death of either the survivor was to receive the entire income until death, when the principal of each was to be distributed as directed by will.—IN RE KELLY'S ESTATE, Penn., 44 Atl. Rep. 289.

116. WILLS—Continuous Document—Evidence.—A will written upon two separate sheets of paper, dated at the beginning, and duly signed, was admitted to probate; the evidence showing that the testatrix had written both sheets, though the handwriting of the second sheet was different in style from that of the first. Held, that the probate will not be set aside on evidence showing that testatrix had re-examined the will some months after it was written, and some expert testimony to the effect that the two sheets were written at different times.—IN RE TAYLOR'S ESTATE, Cal., 58 Pac. Rep. 454.

117. WILLS—Deeds—Testamentary Character.—A deed of trust, complying with requirements of the statute to make a valid conveyance *in præsenti*, containing trust provisions allowing the grantor to use, control, improve, and lease the premises during his life, and enjoy the rents and profits, with power to devise, mortgage, and convey, expressly declaring that the deed is upon trust to permit him to do so, also with power, at his option, to revoke the conveyance and all trusts thereby created, is not void, as being testamentary in character.—KELLY v. PARKER, Ill., 54 N. E. Rep. 615.

118. WILLS—Title to Land—Election.—Beneficiaries entitled to the proceeds of land directed to be sold by an executor under a power of sale contained in a will do not acquire legal title to such land merely by executing a contract to sell it, as evidence of their election to reject the provisions in the will for a sale and distribution by the executor, and a consequent reconversion of the estate into realty.—VAN ZANDT v. GARRETSON, R. I., 44 Atl. Rep. 221.